( )

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No.

CHARLES L. DOUGLAS, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH DISTRICT

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IN COURT OF APPEALS OF NEW YORK

CHARLES L. DOUGLAS, Appellant,

ag'st

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Respondent

REMITTITUR—Filed June 6, 1928

Be it remembered that on the 25th day of April in the year of our Lord one thousand nine hundred and twenty-eight, Charles L. Douglas, the appellant in this cause, came here unto the Court of Appeals, by Thomas J. O'Neill, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The New York, New Haven and Hartford Railroad Company, the respondent in said cause, afterwards appeared in said Court of Appeals by John M. Gibbons, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Mr. Charles D. Lewis, of counsel for the appellant, and by Mr. E. R. Brumley, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs on the authority of Murnan v. Wabash Railway Company, 246 N. Y., 244.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore it is considered that the said judgment be affirmed with costs on the authority of Murnan v. Wabash Railway Company, 246 N. Y., 244, as aforesaid.

[fol. c] And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Ap-

peals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Wm. J. Armstrong, Clerk of the Court of Appeals of the State of New York.

May 29, 1928.

Certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

[fol. 1] SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

CHARLES L. DOUGLAS, Plaintiff-Appellant,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant-Respondent

STATEMENT UNDER RULE 234

This action was commenced by the service of the summons and complaint upon the defendant in the City of New York, on the 22nd day of December, 1927. The defendant has not served its answer to the complaint.

The names of the parties are as above set forth and there has been no change of parties or their attorneys.

On December 31, 1927, the defendant served upon the plaintiff's attorney its notice of motion, returnable at Special Term of the Supreme Court, Westchester County, on January 9, 1928, for an order vacating the service of the summons and complaint herein and dismissing the action on the ground that the cause of action herein, having accrued without the State of New York the jurisdiction of the Court, by reason of the non-residence of the parties, is

wholly discretionary, and that the Court should, in the exercise of its discretion, decline to retain jurisdiction, and on the further ground that Section 47, Subdivision 4 of the General Corporation Law of New York, under which this suit is attempted to be brought, is invalid under the com- [fol. 2] merce clause of the Federal Constitution insofar as it permits the Court to assert jurisdiction, and that both the statute and this action constitute an unjust burden on interstate commerce.

The motion was adjourned from the 9th day of January, 1928, to the 27th day of January, 1928, when it came on for argument before Mr. Justice Arthur S. Tompkins, who, on the 3d day of February, 1928, handed down a memorandum opinion granting defendant's motion to vacate the service of the summons and complaint herein and to dismiss the action on the ground that although the Court had discretionary jurisdiction of the action it should not, in the exercise of sound discretion, entertain the case and should remit the non-resident plaintiff to another forum.

On February 15, 1928, an order dismissing the action, pursuant to said opinion, was entered in the office of the Clerk of the County of Westchester.

On February 16th, 1928, an appeal from said order was taken by the plaintiff to the Appellate Division, Second Department.

[fol. 3] Supreme Court of New York, Westchester County

Charles L. Douglas, Plaintiff,

against

The New York, New Haven and Hartford Railroad Company, Defendant

Notice of Appeal

Sirs: Please take notice that the plaintiff herein hereby appeals to the Appellate Division of the Supreme Court, in and for the Second Department, from the order made in the above entitled action on the 11th day of February, 1928, and filed and entered in the office of the Clerk of the County

of Westchester on the 15th day of February, 1928, granting the defendant's motion to vacate the service of the summons and complaint and dismissing the action; and the plaintiff hereby appeals from the whole of said order, and from each and every part thereof.

Dated White Plains, N. Y., February 16th, 1928.

Yours, &c., Thomas J. O'Neill, Attorney for Plaintiff, 189 Main Street, White Plains, N. Y.

[fol. 4] To John M. Gibbons, Attorney for Defendant, Room 3841, Grand Central Terminal, New York City; Clerk of the County of Westchester.

In Supreme Court of New York

[Title omitted]

Order Appealed From

The above named defendant having duly moved this Court by a notice of motion, dated December 30th, 1927, returnable January 9th, 1928, for an order vacating the service of the summons and complaint herein and dismissing the action; and the hearing of said motion having been adjourned to the 27th day of January, 1928, and said motion having duly come on to be heard on said last mentioned date; and after hearing Mr. Frederick J. Rock, of counsel [fol. 5] for the defendant, in support of said motion, and Mr. Charles D. Lewis, of counsel for the plaintiff, in opposition thereto;

Now, on reading and filing said notice of motion, dated December 30th, 1927, copy of the complaint herein, the affidavit of Frank E. Hall, verified December 30th, 1927, and the affidavit of William H. Bierach, verified January 4th, 1928, in support of said motion; and on reading and filing the affidavit of Charles D. Lewis, verified January 23rd, 1928, and the affidavit of Charles L. Douglas, the plaintiff herein, verified January 20th, 1928, in opposition thereto, it is

Ordered that the defendant's motion be, and the same is hereby, granted, without costs, and that the service of the

summons and complaint herein be, and the same hereby is, vacated, and this action is dismissed.

A. S. Tompkins, Justice of the Supreme Court.

[fol. 6] In Supreme Court of New York

[Title omitted]

Notice of Motion

Sir: Please take notice that upon the affidavit of Frank E. Hall, verified December 30th, 1927, and upon the complaint herein, a motion will be made at a Special Term of the New York Supreme Court, to be held in and for the County of Westchester, at White Plains, New York, on the 9th day of January, 1928, at the opening of Court on that day, or as soon thereafter as counsel can be heard, for an order vacating the service of the summons and complaint herein and dismissing the action on the ground that the cause of action herein, having accrued wholly without the State of New York, the jurisdiction of this Court, by reason of the non-residence of the parties hereto, is wholly discretionary, and this Court should, in the exercise of its discretion, decline to retain jurisdiction thereof, and on the further ground that Section 47, sub-division 4, of the General Corporation Law of New York, under which this suit is attempted to be brought, is invalid under the commerce clause of the Federal Constitution in so far as it permits the Court to assert jurisdiction, and that both the statute and this action constitute an unjust burden on interstate commerce. [fol. 7] And the defendant will move for such other and further relief as may be just and proper in the premises.

Answering affidavits must be served at least five days before the return day hereof.

Dated New York, December 30th, 1927.

Yours, &c., John M. Gibbons, Attorney for Defendant. Office and Post Office address: Room 3841, Grand Central Terminal, New York City.

To Thomas J. O'Neill, Esq., Plaintiff's Attorney, 189 Main Street, White Plains, N. Y.

[fol. 8] IN SUPREME COURT OF NEW YORK

[Title omitted]

AFFIDAVIT OF FRANK E. HALL

CITY AND COUNTY OF NEW YORK, ss:

Frank E. Hall, being duly sworn, deposes and says:

I am an officer, to wit, Assistant Treasurer of The New York, New Haven and Hartford Railroad Company, the defendant herein.

This action was attempted to be brought by the service of a summons and complaint upon deponent on December 22nd, 1927, at Room 3605 in the Grand Central Terminal, New York City. The defendant has not answered for the reason that its time to answer or otherwise move will not expire until the 11th day of January, 1928.

The complaint sets up an alleged cause of action by the plaintiff, Charles L. Douglas, on account of personal injuries stated to have been sustained by him on December 1st, 1927, while in the defendant's employ at the defendant's railroad yards in the City of Waterbury, in the State of Connecticut, as the result of being caught and crushed between cars on tracks as to which plaintiff alleges defendant negligently permitted insufficient clearance between the tracks. A copy of the complaint is hereto attached [fol. 9] marked "Exhibit A" and is made a part hereof. The plaintiff demands judgment in the sum of $50,000 for the injuries in said complaint alleged to have been sustained.

Upon the institution of this suit, the summons and complaint served upon deponent as aforesaid, were transmitted to our counsel in order that the circumstances of the accident and the merits of the case might be investigated in the usual course. Upon the basis of such investigation, I am informed and believe that the defendant has a good and substantial defense upon the merits, namely, that the defendant was wholly free from negligence, and the alleged injuries occurred while the plaintiff was in the employ of the defendant and engaged in work that involved risks which were open, obvious and well known to him at all times during his employment and at the time when it is

alleged that his injuries occurred, and that such risks were assumed by the plaintiff and his alleged injuries arose out of and resulted from such risks.

While the complaint is silent as to the residence of the plaintiff, the records of the defendant show that his residence is at 90 Knoll Street, Waterbury, Conn.

That the defendant is a foreign railroad corporation, organized under and by virtue of the Laws of the State of Connecticut, and is authorized to do business in the State of New York, having applied for and received a certificate for that purpose from the Secretary of said State, as provided by the General Corporation Law of the State of New York, and deponent has been designated as a person upon whom process may be served within the said State of New York.

[fol. 10] The alleged accident is stated to have occurred in Waterbury, Conn., many miles from the State of New York and the jurisdiction of this Court. I am informed and believe that the defendant, for the proper defense of this suit, will be required to call from seven to ten or more witnesses, all of whom are employed either as engineers, brakeman, yardmen or in other capacities by the defendant in that vicinity, or are employed in other lines of business within that locality. If the defendant is required to proceed with the trial of this action in the State of New York, it will be necessary for it to bring these witnesses from the State of Connecticut, many of whom are employed in the operation of the road of the defendant. To call these men from their usual duties to attend the trial of this case at a place so far distant from their place of employment as White Plains, N. Y., would necessitate absence from their duties for an indefinite period of time, thus interfering with the efficiency in the operation of the defendant's railroad service; it would necessitate heavy expense in the maintenance of such witnesses during the trial, and further expense in the employment of other men to fill their duties during their absence, thereby greatly interfering with interstate commerce and causing the defendant great hardship and expense.

The plaintiff himself, deponent believes, is the sole witness for the plaintiff, with the possible exception of medical testimony, which, being in the nature of expert testi-

mony, can be secured in any locality. Deponent further believes that the convenience of the plaintiff would best be subserved by the trial of this case in the courts where the alleged accident took place, and where the plaintiff resides.

This affidavit is made in support of a motion of the de- [fol. 11] fendant for an order of this court directing the dismissal of the complaint herein on the ground that the cause of action herein having accrued wholly without the State of New York, the jurisdiction of this Court, by the reason of the non-residence of the parties hereto, is wholly discretionary, and this Court should, in the exercise of its discretion, decline to retain jurisdition thereof, and on the further ground that Section 47, sub-section 4, of the General Corporation Law of New York, under which this suit is attempted to be brought, is invalid under the commerce clause of the Federal Constitution in so far as it permits the Court to assert jurisdiction, and that both the statute and this action constitute an unjust burden on interstate commerce.

No previous application has been made for the order herein prayed for.

Frank E. Hall.

Sworn to before me this 30th day of December, 1927. Adolph W. Antelmann, Notary Public. Bronx Co. No. 26. Register No. 2940. Cert. filed in N. Y. Co. 293. Reg. No. 9219. Cert. filed in Westchester Co. Term expires March 30, 1929. (Seal.)

[fol. 12] Supreme Court, Westchester County

Charles L. Douglas, Plaintiff,

against

The New York, New Haven and Hartford Railroad Company, Defendant

"Schedule A"

The plaintiff complaining of the defendant alleges as follows upon information and belief:

1. That at all the times herein mentioned defendant was and it now is a foreign Connecticut State railroad common

carrier corporation, and on December 1, 1927, the plaintiff was injured while in the defendant's employ in the defendant's railroad yards at Waterbury, Connecticut.

2. That at the time the plaintiff was so injured he and the defendant were then and there engaged in Interstate Commerce between the different States of the United States of America, and this action is brought under the Acts of Congress of the United States.

3. That on said date, and in said yards, and while plaintiff was in defendant's employ and engaged in said interstate commerce he was caught and crushed between cars on tracks as to which the defendant negligently and carelessly caused and permitted insufficient clearance between the tracks, and the plaintiff sustained fractures and permanent injuries to his ribs, and a permanent injury to his lungs, and ruptures in and permanent injuries to his legs, and his body, health, organs, nerves and nervous system were otherwise permanently injured, and he was rendered [fol. 13] sick, sore and disabled and permanently will so remain, and he was otherwise permanently injured internally and externally, and he lost and will lose his wages at his usual vocation, and has spent and will be obliged to spend sums of money in endeavoring to cure himself, all to his damage in the sum of $50,000, and all being caused without any negligence on his part, but solely by the negligent and wrongful acts and omissions of the defendant, its officers, agents and employees, and by the negligent defects in the defendant's ways, works, tracks, plant and equipment.

Wherefore plaintiff demands judgment against the defendant in the sum of $50,000., together with the costs and disbursements of this action.

Thomas J. O'Neill, Attorney for Plaintiff, 189 Main Street, White Plains, N. Y.

State of New York,
County of Westchester, ss:

Charles L. Douglas, being duly sworn, deposes and says: That he is the plaintiff in the within entitled action, that he has heard read the foregoing complaint and knows the

contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Charles L. Douglas.

Sworn to before me this 22nd day of December, 1927.
Frank J. Hyland, Notary Public, Westchester Co., N. Y.

[fol. 14] In Supreme Court of New York

[Title Omitted]

Affidavit of William H. Bierach

State of Connecticut,
City of New Haven,
County of New Haven, ss:

William E. Bierach, being duly sworn, deposes and says that he is employed in the Connecticut Claims Department of The New York, New Haven and Hartford Railroad Company, the defendant herein, and is familiar with the facts as developed by the investigation in this case. That in investigating this case, deponent finds that the plaintiff herein is, and has been, a resident of Waterbury, Conn., for several years, and now resides with his family at 90 Knoll Street, Waterbury, Conn. That deponent personally conferred with the plaintiff herein several times in connection with this case and has always found the plaintiff at his home at 90 Knoll Street, Waterbury, Conn.

William H. Bierach.

[fol. 15] Sworn to before me this 4th day of January, 1928.
John F. Condon, Notary Public. (Seal.)

State of Connecticut,
County of New Haven, ss:

I, Alfred N. Wheeler, Clerk of the Superior Court, the same being a court of record, within and for said County and State, and the officer authorized by the laws of the

State of Connecticut to make the following certificate of the county of New Haven, do hereby certify:

That John F. Condon, Esquire, whose name is subscribed to the annexed instrument, and thereon written, and before whom the annexed acknowledgement, oath, or affidavit was taken, was at the time of taking such acknowledgement, oath or affidavit a notary public in and for said county of New Haven, residing in said County, duly authorized to take the same, and the officer duly authorized by the laws of said State to take and certify the acknowledgement and proof of deeds to be recorded in said State; and further, that I am well acquainted with the handwriting of such officer, and verily believe that the signature to such acknowledgement, jurat or certificate is genuine. And I further certify that the impression of seals of Notary Publics is not required to be filed in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at New Haven, Connecticut, this 4th day of January A. D. 1928.

Alfred N. Wheeler, Clerk. (Seal.)

[fol. 16] In Supreme Court of New York

[Title omitted]

Affidavit of Charles D. Lewis

County of Westchester, ss:

Charles D. Lewis, being duly sworn deposes and says: I am an attorney and counsellor at law, associated with Thomas J. O'Neill, the attorney for the plaintiff herein, and am familiar with the facts in this case.

This affidavit is submitted in opposition to defendant's motion to vacate the service of the summons and complaint herein and to dismiss the action. The plaintiff claims that this motion should be denied because:

(1) The complaint alleges that at all the times mentioned therein the defendant was a foreign Connecticut State railroad common carrier corporation, and that at the time the plaintiff was injured, December 1, 1927, plaintiff and de-

fendant were engaged in Interstate Commerce, and that the action is brought under the Acts of Congress of the United States. (Federal Employer's Liability Act).

The moving affidavit does not deny that at the time of the accident the plaintiff and defendant were engaged in Interstate Commerce, and admits that the defendant is a [fol. 17] Connecticut corporation authorized to do business in the State of New York and that the service of the summons and complaint was made upon the person duly designated in the State of New York to receive such service.

The facts in this case are beyond dispute that the plaintiff was injured while in the employ of the defendant in the yards of the defendant at Waterbury, Conn., where the plaintiff resides and that by reason of the accident the plaintiff received serious permanent physical injuries.

The basis of defendant's application as set forth in the moving affidavit relates to the convenience of witnesses for both the plaintiff and the defendant, and deponent submits that since this is not an application for the change of venue but for dismissal that the convenience of witnesses furnishes no warrant either as matter of law or as matter of discretion for a dismissal.

A further ground set forth in the moving papers is that Section 47, Subdivision 4 of the General Corporation Law of the State of New York is invalid under the Commerce Clause of the Federal Constitution. There is likewise no merit in such contention as the same question was raised in Murnane vs. Wabash Railway Company, 246 N. Y. 249, wherein it was held that the jurisdiction of this Court was discretionary and that the assumption of jurisdiction could not be refused for reasons of convenience but could only as a matter of sound judicial discretion because "The rules of liability under the Federal Act are of general application. They are in this respect wholly unlike local statutes peculiar to the legislative policies of a single State."

The only other point in the defendant's application is that as a matter of discretion the Court should refuse to [fol. 18] entertain jurisdiction of suits brought by non-residents of adjoining states against non-residents of the said adjoining state where the Courts of that state are open to the parties to the litigation.

Upon the question deponent submits, upon information and belief, that defendant has its general office and employs many thousands of employees in the State of Connecticut, and is strongly entrenched in that State, and is not without powerful influence therein, and the plaintiff prefers to bring this suit in a place which will constitue more neutral ground, and where he will have an even chance of getting justice.

Furthermore, deponent submits that the grounds of defendant's application are wholly immaterial in a case brought under the Federal Employers Liability Act and urges the immateriality of such point with all due respect and in face of the decision of the Court of Appeals in Hurnan vs. Wabash Railway, 246 N. Y. 249, upon the following grounds:

1. That the jurisdiction of the Supreme Court of the State of New York was neither increased nor decreased by reason of the enactment of the Federal Employers Liability Act (Mondeau vs. N. Y. N. H. & H. R. R. Co., 233 U. S. 1) and that the Court's jurisdiction is governed solely in transitory tort actions by the original Colonial Statute of May 6, 1691, creating the Court, and has not and cannot be abridged nor limited in such actions by any amendment to the Constitution of the State of New York nor the statutory law of the State of New York (De Hart vs. Hatch, 37 Hun. 375; People vs. Ince, 204 N. Y. 478, affirming 148 A. D. 933; Clapp vs. McCabe, 84 Hun. 379; affirmed 155 N. Y. 525) and when dealing with a Federal question, particularly when such amendment, whether it increases or decreases the juris-[fol. 19] diction, violates Section 2 of Article 4 of the Federal Constitution, which provides in part: "That the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states," and that therefore Section 47 of the General Corporation Law which attempts to limit the jurisdiction of our Supreme Court is void in its entirety.

2. The decision of Murnan vs. Wabash Railway Company, 246 N. Y. 249, is not binding and controlling upon this Court in so far as it establishes the law to the effect that as matter of law the Supreme Court of this State is vested with discretion to hear or not to hear an action

brought under the Federal Employers' Liability Act. While this statement may seem peculiar and not in accord with the general understanding of the binding effect of a decision of the Court of Appeals upon the interpretation of the law by subordinate State Courts it is based upon the authoritative statement of the United States Supreme Court in the case of Canadian Northern Railway Company vs. Egan, 252 U. S. 553, where that Court said: "The principle upon which this wholly rests is that the Constitutional requirement is satisfied if the non-resident is given access to the Courts of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to residents and citizens. The power is in the Courts, ultimately in this Court, to determine the adequacy and the reasonableness of such terms." It therefore seems reasonable and wholly proper to say that this Court is at liberty and properly so to wholly disregard the pronouncements of the Court of Ap- [fol. 20] peals when construing a Federal Statute and the Federal Constitution and say that the Courts of this State must give access to our Courts to non-residents in the same manner as they must give access to our Courts to residents.

In Taylor vs. Taylor, 144 App. Div. 634, aff'd 204 N. Y. 135 and reversed in 232 U. S. 363, where the action was brought under the very act in question the Supreme Court remanded the cause for further proceedings not inconsistent with its opinion and said at pages 367 and 368:

"We have had many occasions to declare the comprehensive and exclusive power which Congress possesses over interstate commerce. And starting with that power as a factor, we have only to consider the breadth and meaning of the act of Congress. * * * In Second Employers' Liability Cases * * * it and its amendments were declared to be constitutional; that having been enacted in pursuance of a power reserved to Congress, state laws must give way to them. They established the policy for all, it was decided, and the Courts of a State cannot refuse to enforce them on the ground that they are not in harmony with the policy of the State. Congress having acted, it was said, that the laws of the states, in so far as they cover the same

field, are superseded; for necessarily that which is not supreme must yield to that which is."

Such construction of Section 2 of Article 4 of the Federal Constitution has been sustained and upheld in Smith vs. Loughman, 245 N. Y. 486 and in Travis vs. Yale & Towne Mfg. Co., 252 U. S. 60, where in the former case a State statute imposing a different tax rate on inheritance transfers of non-residents than that on residents was held unconstitutional and in the latter case where the income tax law allowing different exemptions to residents and non-residents was likewise held unconstitutional.

[fol. 21] 3. A further reason is found in Mondeau vs. New York, New Haven & Hartford Railroad Co., 223 U. S. 1, where the United States Supreme Court in reversing the courts of Connecticut in refusing to take jurisdiction of a similar action, held that the inclination of such Courts to decline jurisdiction in a case of this kind is "quite inadmissible," and that when Congress established the policy it established a "policy for all of the states," and that the imposition of such jurisdiction would probably not be attended by any appreciable inconvenience, but even if so "it affords no reason for declining the jurisdiction conferred by law." And the claimant's rights under the Federal Act may be enforced "as of right in the Courts of any of the States where jurisdiction as prescribed by local laws is adequate to the occasion."

We assume that the contention will not be raised that the jurisdiction of our Supreme Court is inadequate for the trial of such cases; in fact such an assumption would hardly need notice in view of the fact that almost every day in the week cases under the Federal Act in question and the Safety Appliance Acts are regularly being tried in our Supreme Court.

Wherefore, deponent respectfully submits that defendant's application should be denied both as matter of law and as matter of discretion.

Charles D. Lewis.

Sworn to before me this 23d day of January, 1928.
Frank J. Hyland, Notary Public, Westchester Co., N. Y.

[fol. 22] IN SUPREME COURT OF NEW YORK

[Title omitted]

AFFIDAVIT OF CHARLES L. DOUGLAS

STATE OF CONNECTICUT,
County of ——, ss:

Charles L. Douglas, being duly sworn, deposes and says: That I reside at 90 Knoll Street, Waterbury, Connecticut, and that I have resided in the State of Connecticut fifteen years, and that on the 1st day of December, 1927, while I was employed by the New York, New Haven and Hartford Railroad Company, and while I was switching cars in the Waterbury Yard, Connecticut, engaged in Interstate Commerce, I was caught between two cars on adjoining tracks and severely and permanently injured.

I instituted this action in the Supreme Court, Westchester County, because I did not desire to bring such action in the State Courts of the State of Connecticut, primarily because of the fact that during my residence in the State of Connecticut I have heard and read of the small and inadequate verdicts rendered in the State Courts of Connecticut for personal injuries against this railroad company, and because of the further fact that the defendant railroad company is the largest and strongest railroad operating in the State of Connecticut, and has great influ-
[fol. 23] ence in the State, and employ thousands of men and women in its various undertakings in the State.

Charles L. Douglas.

Sworn to before me this 20th day of January, 1928. William P. Wertheimer, Notary Public, at Waterbury, Conn.

IN SUPREME COURT OF NEW YORK

[Title omitted]

OPINION

The Court of Appeals in the Murnan case (246 N. Y. 244) has settled the question as to the discretionary power of

the Supreme Court at Special Term to grant this motion, and I think that that discretion should be so exercised as to relieve the Courts of this State of the burden of cases that arise in another state and in which none of the parties is a resident of this state. Motion granted.

A. S. T., J. S. C.

[fol. 24] In Supreme Court of New York

Stipulation Waiving Certification

It is hereby stipulated and agreed between the attorneys for the plaintiff and defendant herein that the papers as heretofore printed consist of true and correct copies of the notice of appeal, the order appealed from, and all papers on which the Court below acted in making the order appealed from and the whole thereof, now on file in the office of the Clerk of the County of Westchester, and that the certification thereof, pursuant to Section 616 of the Civil Practice Act, is hereby waived.

Dated February —, 1928.

Thomas J. O'Neill, Attorney for Plaintiff-Appellant.
John M. Gibbons, Attorney for Defendant-Respondent.

[fol. 25] In Supreme Court of New York, Appellate Division, Second Department

[Title omitted]

Stipulation as to Citizenship

It is hereby stipulated that at all the times mentioned in the complaint in this action the plaintiff was and he now is a citizen of the United States, and a citizen and resident of the State of Connecticut; and it is

Further stipulated that the above stipulated facts and admission be annexed to and form part of the record on appeal in this Court upon the appeal recently argued herein and not yet decided by this Court, and which appeal is from an order dated February 11, 1928, granting defendant's mo-

tion to vacate the service of the summons and complaint and dismissing the action.

Dated March 8, 1928.

Thomas J. O'Neil, Attorney for Plaintiff-Appellant.
John M. Gibbons, Attorney for Defendant-Respondent, per E. R. Brumley, of Counsel.

[fol. 26] In Supreme Court of New York, Appellate Division

[Title omitted]

Order of Affirmance—March 21, 1928

The above named Charles L. Douglas, the plaintiff in this action, having appealed to the Appellate Division of the Supreme Court from an order of the Supreme Court entered in the office of the Clerk of the County of Westchester on the 15th day of February, 1928, granting defendant's motion to vacate the service of the summons and complaint and to dismiss the action herein, and the said appeal having been argued by Mr. Charles D. Lewis of Counsel for the appellant and argued by Mr. E. R. Brumley of Counsel for the respondent, and due deliberation having been had thereon.

It is ordered that the order so appealed from be and the [fol. 27] same is hereby unanimously affirmed, with $10 costs and disbursements.

Enter.

E. L., P. J.

Certificate to foregoing paper omitted in printing.

[fol. 28] In Supreme Court of New York

[Title omitted]

Judgment Entered on Remittitur—April 5, 1928

The above named plaintiff, Charles L. Douglas, having appealed to the Appellate Division of the Supreme Court,

Second Judicial Department, from an order vacating the service of the summons and complaint and dismissing the action herein, entered in the office of the Clerk of the County of Westchester on February 15th, 1928; and the said Appellate Division having unanimously ordered and adjudged that the order appealed from be affirmed, and that the respondent recover of the appellant the costs of this appeal; and the defendants costs and disbursements having been duly taxed at One Hundred and 45/100 Dollars ($100.45);

Now, on motion of John M. Gibbons, attorney for the defendant herein, it is

Ordered and adjudged that the order so appealed from be, and the same hereby is, in all respects unanimously affirmed, and that the defendant have judgment against the plaintiff, Charles L. Douglas, for the costs and disbursements of the appeal to the Appellate Division, Second Judicial Department, amounting to One Hundred and 45/100 Dollars ($100.45); and that execution issue therefor.

Enter.

Chas. J. F. Decker, Clerk.

[fol. 29] IN SUPREME COURT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS

SIRS: Please take notice that the plaintiff-appellant hereby appeals to the Court of Appeals of the State of New York from the order of the Appellate Division, Second Department, dated March 21, 1928, and entered in the office of the Clerk of the County of Westchester, on March 29, 1928, which unanimously affirmed with costs the order of the Supreme Court, entered in the office of the Clerk of the County of Westchester, on February 15, 1928, granting defendant's motion to vacate the service of the summons and complaint and to dismiss the action herein; and the plaintiff also appeals to the said Court of Appeals from the judgment entered on the said order and remittitur of

the said Appellate Division, which judgment was entered in the office of the Clerk of the County of Westchester on April 5, 1928, and which judgment unanimously affirmed the aforesaid order and judgment entered in said Clerk's office on February 15, 1928, dismissing the complaint and awarded costs against the plaintiff, and the plaintiff appeals from each and every part and all of said order of the Appellate Division and the judgment entered on the re-[fol. 30] mittitur of the said Appellate Division, entered in said Westchester County Clerk's office on April 5, 1928.

Yours, &c., Thomas J. O'Neill, Attorney for Plaintiff-Appellant, 189 Main Street, White Plains, N. Y.

To Charles J. F. Decker, County Clerk, Westchester Co.; John M. Gibbons, Esq., Attorney for Defendant Respondent, Room 3841, Grand Central Terminal, New York City.

[fol. 31] In Supreme Court of New York

[Title omitted]

Affidavit of No Opinion

County of Westchester, ss:

Charles D. Lewis, being duly sworn, deposes and says that he is an attorney and counsellor at law, associated with Thomas J. O'Neill, the attorney for the plaintiff, and that he has had charge of this case and is familiar therewith, and that at the time of the rendition of the order of the Appellate Division herein, bearing date March 21, 1928, unanimously affirming the order of the Special Term the said Appellate Division did not render any written opinion.

Charles D. Lewis.

Sworn to before me this 12th day of April, 1928. Frank J. Hyland, Notary Public, Westchester Co., N. Y.

[fol. 32] IN SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION

It is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the notice of appeal to the Court of Appeals, the order and judgment of affirmance appealed from and all the papers upon which the Court below acted in making the order and judgment appealed from, and the whole thereof, now on file in the office of the Clerk of the County of New York.

Certification thereof in pursuance of Section 616 of the Civil Practice Act is hereby waived.

Dated New York, April 20, 1928.

Thomas J. O'Neill, Attorney for Plaintiff-Appellant.
John M. Gibbons, Attorney for Defendant-Respondent.

Certificate to foregoing papers omitted in printing.

[fol. 33] IN SUPREME COURT OF NEW YORK

[Title omitted]

ORDER—June 6, 1928

This cause having been brought on upon the remittitur herein, sent down from the Court of Appeals, and now filed in this Court, by which remittitur it appears that an appeal was taken by the plaintiff from an order and judgment of affirmance of the Appellate Division of the Supreme Court, Second Judicial Department, the order having been entered March 29th, 1928, and the judgment in amount of One Hundred and 45 100 Dollars ($100.45) having been entered on April 5th, 1928, said order and judgment affirming an order vacating the service of the summons and complaint and dismissing the action herein, entered in the office of the Clerk of the County of Westchester on February 15th, 1928; and it further appearing by said remittitur that the order of affirmance of the Appellate Division and the judgment appealed from by the plaintiff have been affirmed and the

service of the summons and complaint vacated and the action dismissed, with costs by the Court of Appeals, and that the record and proceedings have been directed by said Court of Appeals to be remitted to this Court, and this Court directed to enforce the judgment of the said Court of Appeals, according to law;

Now, therefore, upon motion of John M. Gibbons, the attorney for the defendant, The New York, New Haven and [fols. 34 & 34½] Hartford Railroad Company, it is

Ordered and adjudged that the judgment in the said Court of Appeals be, and the same hereby is, made the judgment of this Court; and that the defendant, The New York, New Haven and Hartford Railroad Company, have judgment against the plaintiff for costs, when adjusted by the Clerk and inserted in this judgment, and that this order for judgment be annexed to the judgment roll.

Enter.

A. S. Tompkins, J. S. C.

Certificate to foregoing paper omitted in printing.

[Endorsed:] Filed June 6, 1928. Chas. J. F. Decker, Clerk.

[fol. 35] In Supreme Court of New York

[Title omitted]

Judgment—Filed June 6, 1928

An order in this action vacating the service of the summons and complaint and dismissing the action herein, having been entered in the office of the Clerk of the County of Westchester on February 15th, 1928; and the plaintiff having appealed from said order to the Appellate Division of the Supreme Court, Second Judicial Department, and said order having been affirmed in all things by the said *by the said* Appellate Division of the Second Judicial Department, and order of affirmance having been entered thereon on the 29th day of March, 1928, and judgment of affirmance in amount of One Hundred and 45 100 Dollars ($100.45) having been entered thereon on April 5th, 1928; and said

plaintiff having appealed to the Court of Appeals from said order and judgment of affirmance of the Appellate Division, Second Judicial Department; and the said Court of Appeals having sent hither its remittitur, filed herein on the 6th day of June, 1928, by which it appears that the said Court of Appeals has affirmed the said judgment and order vacating the service of the summons and complaint and dismissing the complaint herein, with costs, and has given judgment accordingly and has remitted the judgment of the said Court of Appeals to this Court to be enforced according to law; and this Court having by an order entered herein on the 6th day of June, 1928, ordered that said judgment be made the judgment of this Court, with costs, and the costs having been adjusted by the Clerk of this Court in amount of — Dollars ($295.60);

[fols. 36 & 37] Now, on motion of John M. Gibbons, attorney for the defendant, it is

Ordered and adjudged that the judgment of the said Court of Appeals be, and the same hereby is, made the judgment of this Court; and that the order and judgment of the Appellate Division, Second Judicial Department, affirming the order of this Court vacating the service of the summons and complaint and dismissing the complaint herein, and entered in the office of the Clerk of the County of Westchester on March 29th, 1928 and April 5th, 1928, respectively, be, and they hereby are, affirmed, and the service of the summons and complaint vacated, and the action dismissed, with costs; and the costs having been duly taxed herein at the sum of Two Hundred Ninety-Five and 60/100 Dollars ($295.60/100), and that it have execution therefor.

And it is further ordered and adjudged that the said defendant, The New York, New Haven and Hartford Railroad Company, recover from the said plaintiff, Charles L. Douglas, the sum of Two Hundred Ninety-Five and 60/100 Dollars ($295.60/100) costs as taxed herein, and that it have execution therefor.

Dated New York, June 6th, 1928.

Chas. J. F. Decker, Clerk.

Certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

[fol. 38] Service of three copies is hereby admitted.
April 20, 1928.

John M. Gibbons, Atty. for Deft.

Endorsed on cover: File No. —. New York Supreme Court. Term No. —. Charles L. Douglas, petitioner, vs. The New York, New Haven and Hartford Railroad Company. Petition for writ of certiorari and exhibit thereto. Filed July —, 1928. File No. —.

(2300)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 15, 1928

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3927)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

No. 312

CHARLES L. DOUGLAS, Petitioner,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH DISTRICT, AND BRIEF IN SUPPORT THEREOF.

THOMAS J. O'NEILL,
Counsel for Petitioner.

CHARLES D. LEWIS,
JOHN AMBROSE GOODWIN,
LEONARD F. FISH,
Of Counsel.

(33,821)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 312

CHARLES L. DOUGLAS, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE SUPREME COURT:

The petition of Charles L. Douglas respectfully shows to this Honorable Court:

Summary Statement of Matter Involved.

On the 31st day of December, 1927, an action was commenced in the Supreme Court of the State of New York, Westchester County, pursuant to the Federal Employers' Liability Act of 1908 (35 Stat., 65), as amended by Laws of 1910 (Chap. 143, Sec. 1, 36 Stat., 291), to recover damages for personal injuries to plaintiff.

Plaintiff on December 1, 1927, was injured while in the employ of defendant, while both were engaged in an interstate commerce movement at Waterbury, Connecticut.

Plaintiff is a citizen of the United States and a citizen and resident of the State of Connecticut and that defendant is a foreign Connecticut State railroad corporation doing business and operating a railroad in the counties of Westchester, Bronx and New York, within the State of New York.

On the 9th day of January, 1928, the Special Term of the Supreme Court made and entered its order vacating the service of the summons and complaint and dismissing the action, upon the ground that the jurisdiction of the court in such a case was discretionary and not a matter of right and that plaintiff should be remitted to another forum. Thereafter and on the 21st day of March, 1928, such order was unanimously affirmed by the appellate division and a judgment was entered upon its remittitur. Thereafter and on the 29th day of May, 1928, the order and judgment of the appellate division, unanimously affirming the order of special term, was unanimously affirmed by the Court of Appeals of the State of New York.

Reasons Relied on for the Allowance of the Writ.

The Court of Appeals of the State of New York has finally determined that the laws of the United States (Federal Employers' Liability Act) are to be enforced in the State of New York as a matter of judicial courtesy and not a matter of right.

> "We conclude that a litigant who brings his action under the Federal Employers' Liability Act stands before the Court in no different attitude than a litigant who brings his action under the statute of a sister State."

(Murnan *vs.* Wabash Railway Co., 246 N. Y., 244, reversing 220 App. Div., 218, where the appellate division by a three to two vote based on the opinion of this Court (Mondou *vs.* N. Y., N. H. & H. R. R. Co., 223 U. S., 1) held to the contrary. This theory is also contrary to the law as expressed by the Federal courts (Murray *vs.* Chicago and N. W. Ry. Co., 62 Fed. Rep., 24).

The Court of Appeals of the State of New York has finally determined that citizens of the several States of the United States are not entitled as of right to maintain an action that a resident of the State of New York is entitled to maintain as of right in the courts of the State of New York upon a like cause of action, contrary to the opinions of the highest State Courts of Louisiana and Minnesota on the same question (State *ex rel.* Watkins *vs.* North American Land & Timber Co., 106 Louisiana, 621, 87 Amer. State Reports, 309, and State *ex rel.* Prall *vs.* District Court of Waseca County, 126 Minn., 501; and also to the dictum of Mr. Chief Justice Taft in Missouri Pacific R. R. Co. *vs.* Clarendon Boat Oar Co., 257 U. S., 533).

The Court of Appeals of the State of New York has decided in substance Federal questions of substance, to wit:

(1) Does Section 2 of Article 4 and the second clause of Article 6 of the United States Constitution require the New York State courts to entertain jurisdiction of an action of an injured railroad employee, who is a citizen and resident of Connecticut, against a Connecticut State railroad corporation doing business and operating a railroad in the State of New York, where the State courts of New York allow citizens of New York as a matter of right to sue said foreign corporation, doing business in the State of New York, upon a similar cause of action?

and

(2) Does the Federal Employers' Liability Act require as a matter of right the courts of New York to entertain jurisdiction of an action by an injured railroad employee, and a citizen and resident of the State of Connecticut, against a foreign corporation interstate commerce railroad common carrier doing business in the State of New York, in a way probably not in accord with possible applicable decisions of this Court, and that this Court has not directly heretofore determined these questions (Mondou *vs.* New York, New Haven & Hartford Railroad Co., 223 U. S., 1; Missouri *et al. vs.* Taylor, 266 U. S., 200; Missouri Pacific R. R. Co. *vs.* Clarendon Boat Oar Co., 257 U. S., 533; Gile *vs.* Cunningham, 133 U. S., 107; Chambers *vs.* B. & O. R. R. Co., 207 U. S., 142; State *ex rel.* Prall *vs.* The District Court of Waseca County, 126 Minn., 501).

The questions involved in this case are of great public interest to the thousands of railroad employees,

their widows and children who are either injured or deprived of their support by the negligence of the railroads every year and who of necessity institute actions under the Federal Employers' Liability Act to compensate them for their losses.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of New York for the Ninth District, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 442, Charles L. Douglas, plaintiff-appellant, against The New York, New Haven and Hartford Railroad Company, defendant-respondent, and that the said order and judgment of the court of appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

CHARLES L. DOUGLAS,
Petitioner.

THOMAS J. O'NEILL,
Counsel for Petitioner.

Office Address, 189 Main Street, White Plains, N. Y.

CHARLES D. LEWIS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 312

CHARLES L. DOUGLAS, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The learned special term rendered the following unreported opinion:

> "The Court of Appeals in the Murnan case (246 N. Y., 244) has settled the question as to the discretionary power of the Supreme Court at Special Term to grant this motion, and I think that that discretion should be so exercised as to relieve the Courts of this State of the burden of cases that arise in other states and in which none of the parties is a resident of this State. Motion granted" (R., 16-17).

The Appellate Division of the Supreme Court rendered a memorandum opinion, reported in 223 App. Div., 782, as follows:

> "Order granting defendant's motion to set aside service of summons and complaint and dismiss action affirmed, with ten dollars costs and disbursements" (R., 18).

The Court of Appeals rendered the following opinion on May 29, 1928, 248 N. Y., 78 (Mem.), Vol. 1435, Weekly Advance Sheets:

> "Judgment affirmed, with costs, on authority of Murnan *vs.* Wabash Railway Co., 246 N. Y., 244" (R., 1).

II.

Jurisdiction.

1. The judgment and order of the Court of Appeals to be reviewed is dated May 29, 1928 (R., 1 2).

2. Petitioner contended in the lower Court that he was entitled to maintain his action against the defendant as a matter of right, in accordance with Article 4, Section 2 of the United States Constitution, providing:

> "The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states."

And the second clause of Article 6 of the United States Constitution, providing:

> "This Constitution and the laws of the United States, which shall be made in pursu-

> ance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in each state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

And the second clause of Section 6 of the Federal Employers' Liability Act, as amended by the Laws of 1910, Chapter 143, Section 1, 36 U. S. Stat., 291:

> "Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of the commencement of such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States * * *."

And Subdivision 4 of Section 47 of the General Corporation Law of the State of New York:

> "An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only * * * (4) Where a foreign corporation is doing business within this state."

3. The jurisdiction of this Court is sought to be invoked under Section 237 of the Judicial Code, as amended, Subdivision B:

"It shall be competent for the Supreme Court, by *certiorari*, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any case wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn any question, the validity of a treaty or statute of the United States; * * * or where any title, right, privilege or immunity especially set up or claimed by either party under the Constitution, * * *; and the power to review under this paragraph may be exercised as well where the federal claim is sustained as where it is denied * * *."

4. The cases upon which the petitioner bases his application are as follows: Mondou *vs.* N. Y., N. H. & H. R. R. Co., 223 U. S., 1, reversing 82 Conn., 373, where the Court said, at pages 57-59:

"The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be represented accordingly in the courts of the State. * * * We are not disposed to believe that the exercise of jurisdiction by the State courts will be at-

> tended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. • • • We conclude that rights arising under the Act in question may be enforced, as of right, in the courts of the State when their jurisdiction, as prescribed by local laws, is adequate to the occasion."

Missouri *et al. vs.* Taylor, 266 U. S., 200, at page 208, where the Court, by Brandeis, J., said:

> "The Federal right is enforceable in a State Court whenever its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws."
>
> "Missouri conferred jurisdiction over claims of this nature upon the Court in which the consignee sued. • • • No peculiarity of state procedure will be permitted to enlarge or to abridge a substantive Federal right."

Missouri & Pacific R. R. Co. *vs.* Clarendon Boat Oar Co., 257 U. S., 533, where the Court, by Mr. Chief Justice Taft, said:

> "Under Section 2 of Article 4 of the Federal Constitution, the citizens of each state are entitled to all the privileges and immunities of the citizens of the several states. This secures citizens of one state the right to resort to the courts of another state equally with the citizens of the latter state."

Gile *vs.* Cunningham, 133 U. S., 107, where the Court said, at pages 113-114:

> "The intention of Section 2 of Article 4 was to confer on the citizens of the several states a general citizenship and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under like circumstances, and this includes the right to institute actions. The fact of the citizenship of Butler and Hayden did not affect their privilege to sue in New York and have the full use and benefit of the courts of that State in the assertion of their legal rights; * * *."

Chambers *vs.* Baltimore & Ohio R. R. Co., 207 U. S., 142; State *ex rel.* Watkins *vs.* North American Land & Timber Co., 106 Louisiana, 621; State *ex rel.* Prall *vs.* District Court, 126 Minn., 501.

III.

Statement of the Case.

The plaintiff, a citizen of the United States, and citizen and resident of the State of Connecticut, while engaged in the defendant's employ at its Waterbury yards, in the State of Connecticut, in an Interstate Commerce movement, sustained serious personal injuries on December 1, 1927, and instituted this action under the Federal Employers' Liability Act, in the Supreme Court, Westchester County, to recover for such injuries. Defendant moved before answer to vacate the service and dismiss the action on the ground that the Court's jurisdiction was wholly discretionary, and under the circumstances, since both the plaintiff

and defendant were non-residents of the State of New York, and that the action happened wholly outside the State of New York, the Court in the exercise of sound discretion should refuse to entertain this action.

This view was sustained at Special Term and unanimously affirmed in the Appellate Division (although that Court had previously held to the contrary in Murnan *vs.* Wabash Ry. Co., 220 App. Div., 218) and Court of Appeals, as set forth in the petition herein.

IV.

Specification of Errors.

1. The Court of Appeals, the Appellate Division and Special Term erred in finding and holding that in an action brought under the Federal Employers' Liability Act the Supreme Court of the State of New York has any discretion whatsoever to entertain or decline to entertain jurisdiction of the action.

2. The Court of Appeals, the Appellate Division and Special Term erred in finding and holding that Article 4, Section 2, and the second clause of Article 6 of the United States Constitution do not compel the Supreme Court of the State of New York to entertain jurisdiction of this cause of action as a matter of absolute right, in view of the jurisdiction of said Supreme Court as established by the case of Gregonis *v.* Philadelphia Coal & Iron Co., 235 N. Y., 152.

3. The Court of Appeals, the Appellate Division and Special Term erred in finding and holding that the sec-

ond clause of Section 6 of the Federal Employers' Liability Act, and Subdivision 4 of Section 47 of the General Corporation Law of the State of New York, do not compel the Supreme Court of the State of New York to take jurisdiction of this cause of action as a matter of absolute right.

V.

Argument.

The Court of Appeals bases its decision in this case upon the authority of Murnan *vs.* Wabash Railway Co., 246 N. Y., 244, reversing 200 App. Div., 218, where two questions were certified to the Court by the Appellate Division, as follows:

1. Are the courts of this State vested with any discretion to decline jurisdiction of an action brought under the Federal Employers' Liability Act by a nonresident of the State of New York against a foreign railroad corporation, doing business in the State of New York at the time of the commencement of the action?

2. Should the motion of the defendant railway company for an order vacating the service of the summons and complaint herein and dismissing the action have been granted as matter of law?

The Appellate Division, as above set forth, by a divided court of three to two, Young, J., writing the opinion, held that under the Federal Employers' Liability Act the Supreme Court of the State of New

York had no discretion in the matter of jurisdiction, and that such an action was maintainable as matter of right. This decision was reversed by the Court of Appeals, as aforesaid, and question No. 1 answered in the affirmative, and No. 2 in the negative.

It is respectfully contended under the decisions of this Court in Mondou *vs.* New York, New Haven and Hartford Railroad Company and Missouri *et al. vs.* Taylor, *supra*, no peculiarity of State procedure will be permitted to enlarge or abridge a substantial Federal right; and that where an action is brought in the State court and its ordinary jurisdiction as prescribed by local statutes is adequate to the occasion, the action may be maintained in such court as a matter of right when brought under a Federal statute.

And in Missouri Pacific Railroad Co. *vs.* Clarendon Boat Oar Co., Gile *vs.* Cunningham, Chambers *vs.* Baltimore and Ohio R. R. Co., *supra*, that the privilege referred to in Section 2 of Article 4 of the United States Constitution is one of the oldest and most essential privileges of citizenship and must be allowed by each State to the citizens of all other States to the precise extent that is allowed to its own citizens, and that it secures to the citizens of one State the right to resort to the courts of another State equally with the citizens of the latter State.

These being the rights that the Federal Constitution secures to the citizens of the State of Connecticut in the courts of the State of New York, it is contended the petitioner has been deprived of a Federal

right of substance in being refused as matter of law to prosecute his cause of action under the Federal Employers' Liability Act in a court situated in a county in a State wherein the defendant was doing business at the time of the accident and at the commencement of the suit.

The Court of Appeals, in Gregonis *vs.* Philadelphia Coal & Iron Co., 235 N. Y., 152, the latest authoritative decision upon the subject of rights of citizens of New York to sue foreign corporations, held that the Supreme Court of New York had no discretion to refuse to hear a case brought by a resident of the State of New York upon a cause of action in tort against a foreign corporation arising in another State.

This decision establishes the only question of law of the State of New York that is binding upon this Court, in view of the Federal cases cited *supra*, and absolutely establishes the fact that the decisions in the Murna case and the case at bar are based upon an erroneous unconstitutional practice of the courts of the State of New York, in refusing to grant to the citizens of a sovereign State of the United States the same right to resort to the courts of the State of New York as they grant to citizens of New York.

Perhaps two of the clearest expressions of this right are found respectively in State *ex rel.* Watkins *vs.* North America Land and Timber Co., 106 Louisiana, 621, where the court said, at page 317:

> "If, therefore, the present action would lie in favor of a citizen of Louisiana, it will lie in

> favor of a non-resident relator; and all the more is it true if the relator is a citizen of Kansas, since the Constitution of the United States in such case secures to him, in Louisiana, all the rights, privileges, and immunities which the State of Louisiana accords to its own citizens."

And in State *ex rel.* Prall *vs.* District Court of Waseca County, 126 Minn., 501, where the Court said, at pages 504-5:

> "The question for decision is made plain and its solution certain if we make and answer this inquiry: Why is the relator denied access to our courts? It is not because of the nature of his cause of action. It is not because it arose in Iowa. It is because he is a citizen of Iowa. Therefore, the refusal is violative of the Constitution. It is not a matter of comity. There is no question of discretion. In the Chambers case three of the judges dissented. The conclusion which we have reached is the necessary result of both the prevailing and dissenting opinions. The subject easily leads itself to an exhaustive discussion and review of authorities. It is not worth the while. The one case cited by the Court of final authority conclusively determines the question. There is no discretion in the District Court to decline to entertain jurisdiction."

It follows, therefore, that the Court of Appeals, the Appellate Division and the Special Term of the Supreme Court of the State of New York erred, and it is respectfully submitted that this case is one calling

for the exercise by this Court of its supervisory powers to such end that a writ of certiorari should be granted, and that this Court should review the decision of the Court of Appeals and finally reverse it.

THOMAS J. O'NEILL,
Counsel for Petitioner.

Office and Post Office address: 189 Main Street, White Plains, N. Y.

CHARLES D. LEWIS,
JOHN AMBROSE GOODWIN,
LEONARD F. FISH,
Of Counsel.

FILED
NOV 6 1928
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 312.

CHARLES L. DOUGLAS, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Brief in Support of Writ of Certiorari to the Supreme Court of the State of New York.

THOMAS J. O'NEILL,
Counsel for Petitioner,
189 Main Street,
White Plains,
New York.

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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 312.

CHARLES L. DOUGLAS, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Brief in Support of Writ of Certiorari to the Supreme Court of the State of New York.

I.

The Opinions of the Courts Below.

The learned Special Term rendered the following unreported opinion:

> "The Court of Appeals in the *Murnan* case (246 N. Y., 244) has settled the question as to the discretionary power of the Supreme Court at Special Term to grant this motion, and I think that that discretion should be so exercised as to relieve the Courts of this State of the burden of cases that arise in other states and in which none of the parties is a resident of this State. Motion granted" (R., 16-17).

The Appellate Division of the Supreme Court rendered a memorandum opinion, reported in 223 App. Div., 782, as follows:

> "Order granting defendant's motion to set aside service of summons and complaint and dismiss action affirmed, with ten dollars costs and disbursements" (R., 18).

The Court of Appeals rendered the following opinion on May 29, 1928, 248 N. Y., 78 (Mem.), Vol. 1435, Weekly Advance Sheets:

> "Judgment affirmed, with costs, on authority of *Murnan* v. *Wabash Railway Co.*, 246 N. Y. 244" (R., 1).

II.

Jurisdiction.

1. The judgment and order of the Court of Appeals to be reviewed is dated May 29, 1928 (R., 1-2).

2. Petitioner contends that he was entitled to maintain this action under the Federal Employers' Liability Act in the New York Supreme Court, Westchester County, against the defendant, as a matter of right in accordance with Article 4, Section 2, of the United States Constitution, providing:

> "The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states."

And the second clause of Article 6 of the United States Constitution, providing:

> "This Constitution and the laws of the United States, which shall be made in pursuance thereof,

> and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in each state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

And the second clause of Section 6 of the Federal Employers' Liability Act, as amended by the Laws of 1910, Chapter 143, Section 1, 36 U. S. Stat., 291:

> "Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of the commencement of such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States * * *."

And Subdivision 4 of Section 47 of the General Corporation Law of the State of New York:

> "An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only * * * (4) Where a foreign corporation is doing business within this state."

3. The jurisdiction of this Court is sought to be invoked under Section 237 of the Judicial Code, as amended, Subdivision B:

> "It shall be competent for the Supreme Court, by *certiorari*, to require that there be certified

to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any case wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn any question, the validity of a treaty or statute of the United States; * * * or where any title, right, privilege or immunity especially set up or claimed by either party under the Constitution. * * *; and the power to review under this paragraph may be exercised as well where the federal claim is sustained as where it is denied * * *."

and

This Court's granting of petitioner's petition for a Writ of Certiorari on the 8th day of October, 1928, (R., 24-25).

4. The cases upon which the petitioner based his application for certiorari are as follows:

Mondou v. *N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1, reversing 82 Conn., 373.

Missouri et al. v. *Taylor*, 266 U. S., 200.

Missouri & Pacific R. R. v. *Clarendon Boat Oar Co.*, 257 U. S., 533.

Gile v. *Cunningham*, 133 U. S., 107.

Chambers vv. *Baltimore & Ohio R. R. Co.*, 207 U. S., 142.

State ex rel. Watkins v. *North American Land & Timber Co.*, 106 Louisiana, 621.

State ex rel. Prall v. *District Court*, 126 Minn., 501.

III.

Statement of the Case.

The plaintiff, a citizen of the United States, and citizen and resident of the State of Connecticut (R., 17-18), while engaged in the defendant's employ at its Waterbury yards, in the State of Connecticut, in an Interstate Commerce movement, sustained serious personal injuries on December 1, 1927, and instituted this action under the Federal Employers' Liability Act, in the Supreme Court, Westchester County, to recover for such injuries (R., 8-9). It is admitted that the defendant was engaged in business in the State of New York and operated a railroad in Westchester County in that State. Defendant moved before answer to vacate the service and dismiss the action on the ground that the Court's jurisdiction was wholly discretionary, and under the circumstances, since both the plaintiff and defendant were non-residents of the State of New York, and that the action happened wholly outside the State of New York, the Court in the exercise of sound discretion should refuse to entertain this action (R., 5-8).

This view was sustained at Special Term and unanimously affirmed in the Appellate Division (although that Court had previously held to the contrary in *Murnan* v. *Wabash Ry. Co.*, 220 App. Div., 218) and Court of Appeals, as set forth in the petition for review.

IV.

Specification of Errors.

1. The Court of Appeals, the Appellate Division and Special Term erred in finding and holding that in an action brought under the Federal Employers' Liability Act the Supreme Court of the State of New York has any discretion whatsoever to entertain or decline to entertain jurisdiction of the action.

2. The Court of Appeals, the Appellate Division and Special Term erred in finding and holding that Article 4, Section 2, and the second clause of Article 6 of the United States Constitution do not compel the Supreme Court of the State of New York to entertain jurisdiction of this cause of action as a matter of absolute right, in view of the jurisdiction of said Supreme Court as established by the case of *Gregonis* v. *Philadelphia Coal & Iron Co.*, 235 N. Y., 152.

3. The Court of Appeals, the Appellate Division and Special Term erred in finding and holding that the second clause of Section 6 of the Federal Employers' Liability Act, and Subdivision 4 of Section 47 of the General Corporation Law of the State of New York, do not compel the Supreme Court of the State of New York to take jurisdiction of this cause of action as a matter of absolute right.

V.

ARGUMENT.

The Supreme Court of the State of New York is without power to refuse jurisdiction, and to dismiss a complaint, in an action upon the Federal Employers' Liability Act, against a railroad common carrier doing business in the State of New York.

The policy of the State of New York discriminating against non-resident plaintiffs in like actions, is as we respectfully contend, void, unsound and unconstitutional and cannot defeat an action brought under the Federal Act by a citizen of another state against a Railroad Common Carrier doing business in New York State.

Congress made provision that such action may be brought in the district, in which the accident occurred, or in which the defendant resides, or *the district in which the defendant is doing business* (U. S. Compiled Statutes, Sec. 8662; Chap. 149, Sec. 6, April 22, 1908, 35 Statutes 66, Amended, April 5, 1910, Chap. 143, Sec. 1, 36 Statutes 291), whichever is selected by the injured workman or his widow, or orphans.

Congress well knew that any pretense of hardship upon a great railroad corporation in defending in the district in which they are doing business, no matter how far away from the *residence* of the corporation, is disingenuous.

Therefore, as above stated, Congress, made provision that the plaintiff can maintain his action in the district he chose.

Not only that, Congress gave further protection to employees and their widows and orphans, and provided that the State Courts shall have jurisdiction, and blocked any attempt to remove the case to the Federal Court, which also, in some parts of the country, might be remote from the plaintiff's home (U. S. Compiled Statutes, Sec. 8662; Chap. 149, Sec. 6, April 22, 1908, Amended April 5, 1910, Chap. 143, Sec. 1, 36 Statutes 291)

The question therefore is, whether when Congress has explicitly conferred a *right* upon a non-resident interstate railroad employee, under Federal protection, to bring an action in the Supreme Court of the State of New York, can any court of that State arbitrarily nullify the Act of Congress in any case which may be brought before it under the guise of the "anomalous" practice of the Courts of that State? (*Murman* case, 246 N. Y. 244.)

The plaintiff is entitled to maintain this action, as one under the Federal Employers' Liability Act, in

accordance with the provisions of Section 6 of that Act, as amended by the Act of Congress of 1910, supr.

This amendment provides that such an action may be brought in any Circuit Court of the United States in the District of the residence of the defendant, or in which the causes of action arose, or in which the defendant shall be doing business at the time of the commencement of the action.

The amendment further provides that under the same circumstances the state courts shall have concurrent jurisdiction with the United States Courts, and further provides, that no cause arising under this act, which is brought in any state court, shall be removed to any court of the United States. *Thus emphasizing the intention of Congress* to provide that an injured employee of a common carrier might sue under this act, either in the Circuit Court of the United States, or in any state court in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of the commencement of the action. Congress had the right to confer this jurisdiction upon the state courts, *and its provisions are supreme* (*Matter of Taylor*, 232 U. S. 363) *Toledo, St. Louis & Western R. R.* v. *Allen*, No. 160 U. S. Daily yearly index, page 3611, February 24, 1928, and no state court can avoid or refuse to accept the jurisdiction thus conferred. Said act reads as follows:

> "An act to amend an Act entitled, 'An Act relating to the liability of common carriers by railroad to their employees in certain cases, approved April twenty-second, nineteen hundred and eight.
>
> "Be it enacted by the Senate and House of Representatives of the United States of America

in Congress assembled that an Act entitled, 'An Act relating to the liability of common carriers by railroad to their employes in certain cases,' approved April twenty-second, nineteen hundred and eight, be amended in Section Six so that said section shall read:

"Sec. 6. No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

"Under this act an action may be brought in a Circuit Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under the act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any State Court of competent jurisdiction shall be removed to any act of the United States" * * *.

(April 5, 1919, Chap. 143, Sec. 1, 36 Statutes 291.)

There are few cases that define the real intent of this act.

In *Mondou* v. *New York, New Haven & Hartford Railroad Co.*, 223 U. S. 1, reversing 82 Connecticut 373 and affirming 173 Fed. Rep. 494, this Court construed the Act as follows (pp. 57-59):

"The suggestion that the Act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it pre-supposes what in legal contempla-

> tion does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be represented accordingly in the courts of the State. * * * We are not disposed to believe that the exercise of jurisdiction by the State courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. *The existence of the jurisdiction creates an implication of duty to exercise it*, and that its exercise may be onerous does not militate against that implication. * * * We conclude that rights arising under the Act in question may be enforced, as of right, in the courts of the State when their jurisdiction, as prescribed by local laws, is adequate to the occasion."

No case has arisen in the New York State Courts and gone to the United States Supreme Court where any part of the Federal Act has been construed except *Taylor* v. *Taylor*, 144 App. Div. 634, aff'd. 204 N. Y. 135, reversed in 232 U. S. 363, with the warning to all State Courts in unmistakable terms:

> "We have had many occasions to declare the comprehensive and exclusive power which Congress possesses over interstate commerce."

and, therefore, we find no authority in the cases cited by the Court of Appeals in the *Murnan* case, *supra*, since all of such cases are constructions of Section 47

of the General Corporation Law or similar State Statutes under the due process clause of the Federal Constitution which has no application to the issues here involved.

In *Missouri et al* v. *Taylor*, 266 U. S., 200, at page 208, the Court by Brandeis, *J.*, said:

> "The Federal right is enforceable in a State Court whenever its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws."

Citing again the *Mondou* case, *supra*:

> "Missouri conferred jurisdiction over claims of this nature upon the Court in which the consignee sued. * * * No peculiarity of state procedure will be permitted *to enlarge* or *to abridge a substantive Federal right*" (italics ours).

No attempt was made by Congress to increase the jurisdiction of State Courts and any such attempt would have been void, but what Congress did do was to seek to compel State Courts to exercise a jurisdiction they already possessed not as an act of judicial courtesy but as matter of law to and only to such extent as jurisdiction existed before the amendment.

We have not been able to find any case, decided since the amendment, in which this Court has permitted any interference with the jurisdiction thus expressly conferred by this amendment passed by Congress.

No sound principle of law has ever been cited by any court to attempt to sustain New York's "anomalous" practice even though such practice is thought to be well established, but, on the contrary much sound reasoning

by various courts shows the fallacy of the theory (*Gregonis* v. *P. & R Coal & Iron Co.*, 235 N. Y. 152; *Zikos* v. *Oregon R. & Navigation Co.*, 179 Fed. 893, at page 901).

In the *Murnan* case, *supra*, at page 248, Pound, *J.*, says:

> "We conclude that a litigant who brings his action under the Federal Employers' Liability Act stands before the court in no different attitude than a litigant who brings his action under the statute of a sister State. He may not be cast out because he is suing under the act of Congress. He may not enforce his rights merely because he is suing under the act."

That is what the Courts of Connecticut seemed to think was the law (*Moudou* v. *New York, New Haven and Hartford Railroad Company* and *Hoxie* v. *New York, New Haven and Hartford Railroad Company*, 73 Atl. Rep. 754) and exactly what Congress enacted the amendment of 1910 to do away with (House Report of February 22, 1910, Senate Report of March 22, 1910, to accompany H. R., 17263).

An excerpt from said reports is attached as Appendix A of this brief.

Article 4, Section 2, of the Federal Constitution reads as follows:

> "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."

This article is not within the due process provisions of the Federal Constitution but one of the original articles ratified by the States and within that part of the

Federal Constitution which the Judges of all State Courts by their oath of office pledge their support as part of the "*Supreme Law of the Land.*"

The Court of Appeals of New York in *Gregonis* v. *Philadelphia & Reading Coal & Iron Company*, 235 N. Y. 152, in deciding a resident's rights, held, by Crane, *J.*:

> "A thorough search of the authorities from the enactment of revised statutes down to the present day has failed to disclose a single incident wherein the Courts of this State have refused to entertain jurisdiction over a foreign corporation in behalf of a resident for a cause of action arising out of the state. * ** * If we should hold that the Supreme Court had discretion to refuse to hear a case brought by a resident upon a cause of action in tort against a foreign corporation arising in another state, why should it not have like discretion regarding an action upon contract made and executed in another state? * * * A selection between resident plaintiffs—opening the courts to one and closing them to the other—would probably run counter to the constitutional provision of Section 1 of the 14th amendment of the Constitution of the United States. * * * When the Supreme Court says to one resident plaintiff, 'We will not hear your case against a Pennsylvania corporation for a tort committed within that State,' and has power to say to another resident, 'We will hear your case on like facts,' it comes very near to a violation of these constitutional provisions. * * * We are, therefore, of the opinion that, assuming as we must, this plaintiff to be a *bona*

> *fide* resident of the State of New York, the Supreme Court could not refuse to hear his case and had no right to dismiss it."

This case establishes the fact that the Supreme Court of New York must entertain an action brought by a resident against a foreign corporation doing business in this State upon a cause of action *in tort* accruing without the State of New York.

This case, we presume, will be followed by this Court, in deciding the rights of resident plaintiffs to resort to the courts of New York. We have therefore only to deal with the view that this Court takes in relation to the "*privileges and immunities of the citizens of the several states*" when they bring like suit in a court in a state where a resident of that state could maintain the same suit *as matter of right.*

This Court held in *La Tourette* v. *McMaster*, 248 U. S. 465 at page 470:

> "*But our conclusion is not rested upon the mere use of the word 'residents'; for no doubt it might appear from the purpose and scope of an act that 'residents' was used in the sense of 'citizens.' If so, the Court would so construe it; and in no event would the Court sanction an evasion of the purpose and intent of this wise and wholesome provision of the Constitution based on mere verbiage.*"

What else can such a statement mean than when the words 'residents' and 'citizens' are synonymous in their use they will be so declared.

We contend that the use of the words 'resident' and 'non-resident' in the present New York statute (General Corporation Law, Section 47) and in the sections from which it was derived (General Corporation Law, Section 46; Code of Civil Procedure, Section 1780) are

synonymous in one sense with 'citizen' and have been so judicially sanctioned by the Courts of New York ever since the existence of the State.

In support of this contention we challenge the defendant to cite one case where the Courts of New York have denied the absolute right to sue, to any plaintiff whether he be a 'citizen' of New York, a 'resident' of New York, or a friendly 'alien' residing in New York. If no such distinction has ever been made or attempted then a 'citizen' of the United States who becomes such only either by birth or naturalization, becomes a 'citizen' of New York at birth or naturalization and remains such until he changes his domicile sometime later in life at his will; a 'resident' of New York is either a 'citizen' of the United States and a 'citizen' of New York or a 'subject' of a foreign country and a 'resident' of New York. He must be one of the other to be a *bona fide* 'resident.' Therefore, if under any one these various names or conditions a plaintiff has an absolute right to resort to the Courts of New York the use of the word 'resident' in New York statutes is nothing but "an evasion of the purpose and intent of this wise and wholesome provision of the Constitution based on mere verbiage."

In fact the word 'resident' as used in the New York statutes relating to jurisdiction is not only synonymous with 'citizen' but also includes the 'alien' *bona fide* resident of the state.

Crane, *J.*, *in Gregonis* v. *P. & R. Coal & Iron Co.*, 235 N. Y. 152, says at page 156:

> "The notes of the revisers had this to say: 'the fair protection of our own CITIZENS requires that some provision shall be made to render such corporations amenable to our laws and in our own courts'."

At page 159:

> "The courts of this state were primarily for the RESIDENTS of his state. There must be some forceful and controlling reason entering into the very nature and essence of the action which would close their doors to its own CITIZENS."

The Constitution of New York, Section 11 of Article 1, provides:

> "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any CITIZEN thereof, unless by the law of the land, or the judgment of his peers."

And the learned judge writing the *Gregonis'* opinion, *supra*, at page 159, cites this very section of the State Constitution to sustain his opinion that "a selection between resident plaintiffs—opening the courts to one and closing them to the other—would probably run counter to the constitutional provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States, * * *."

This one case should be conclusive proof of how careful the Courts of New York are to point out that there is in reality no valid distinction between a citizen's, resident's or alien's right to use New York Courts under the all inclusive word 'resident.'

If this be so, then to grant as matter of right the use of New York Courts to the citizen, resident and alien alike in tort actions and deny a like absolute right to a native born American citizen, a citizen and resident of the State of Connecticut is the clearest kind of unconstitutional discrimination.

No other state has ever attempted such a brazen violation of the fundamental right of a citizen of a free government (the right to resort to his Courts),

and yet give to the alien resident equal right with the citizen resident to the detriment of the citizen non-resident.

Palmer v. *DeWitt*, 47 N. Y. 532.
Janas v. *Municipal Gas Co.*, 88 A. D. 251.
Alfson v. *Bush Co.*, 182 N. Y. 393.
Kleps v. *Bristol Mfg. Co.*, 107 A. D. 488; affd. 189 N. Y. 516.
George v. *Pierce*, 85 Misc. 105.
Hatch v. *Luckman*, 155 A. D. 765.
Sliosberg v. *New York Life Ins. Co.*, 244 N. Y. 482.

In *Missouri Pacific R. R. Co.* v. *Clarendon Boat Oar Co.*, 257 U. S. 533, 66 Law. Ed., 354, this Court held following the interpretation of the Supreme Court of Louisiana, that where a resident of Louisiana could not have a process in the courts of Louisiana a non-resident could not, and Mr. Chief Justice Taft, delivering the opinion, said:

> "Under Section 2 of Article 4 of the Federal Constitution, the citizens of each state are entitled to all privileges and immunities of citizens in the several states. This secures citizens of one state the right to resort to the Courts of another state, equally with the citizens of the latter state."

The *Louisiana* case, upon which this Court based its decision was *State ex rel Watkins* v. *North American Land & Timber Co.*, 106 Louisiana, 621, 87 Amer. State Reports 309, at page 317, where that Court said:

> "The plea to jurisdiction is based on the proposition that the constitutional and statutory law which has been quoted was intended to con-

> fer upon state courts jurisdiction only in suits brought by citizens of Louisiana against foreign corporations engaged in business here, upon contracts entered into or causes of action arising in this state, and that service of process on the agents of such corporation, designatee in compliance with that law, should not be held to confer jurisdiction in other suits, without regard to the citizenship of the plaintiffs or the subject matter or place of origin of the controversy. Proceeding to the consideration of this proposition we find nothing in the law in question to *discriminate in favor of the citizens of Louisiana* in the matter of bringing suits against foreign corporations, the discrimination made by the second section of the statute relates only to the place of origin of the right or cause of action, *and operating favorably to citizens of other states and countries as to citizens of this state*. If, therefore, the present action would lie in favor of a citizen of Louisiana, it will lie in favor of a nonresident relator; and all the more is it true if the relator is a citizen of the State of Kansas, since the constitution of the United States in such cases secures to him, *in Louisiana* all the rights, privileges, and immunities which the State of Louisiana accords to its own citizens."

In *Gile* v. *Cunningham*, 133 U. S. 107, this Court in construing the Federal Constitution holds that it in effect enables the citizens of one state to maintain actions in the courts of another. The Court says, at pages 113-114:

> "The intention of Section 2 of Article 4 was to confer on the citizens of the several states a

> general citizenship and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under like circumstances, and this includes the right to institute actions. The fact of the citizenship of Butler and Hayden did not affect their privilege to sue in New York and have the full use and benefit of the courts of that State in the assertion of their legal rights; * * *."

In *Ward* v. *Maryland*, 12 Wallace 430, the United States Supreme Court held that non-residents were entitled to maintain actions in the courts of states other than their residence.

The same contention and interpretation of the Federal Constitution has also been maintained in *Morgan* v. *Neville*, 74 Pa. State 57, where the Court held that a citizen of Pennsylvania could sue in Maryland.

In *Barrall* v. *Benjamin*, 15 Mass., 354, the Courts of Massachusetts held that a citizen of Connecticut was entitled to all the privileges of the citizens of Massachusetts in the Massachusetts Courts.

In *State ex rel Prall* v. *The District Court of Waseca County*, 126 Minn. 5011. Action brought under the Federal Employers' Liability Act in Minnesota. The action arose in Iowa and the plaintiff was a citizen and resident of Iowa. Defendant was incorporated under the Laws of Illinois, and doing business in Minnesota. Mandamus was granted to compel the District Court to entertain jurisdiction of the action as a matter of right when it had refused to in the exercise of its discretion. The Court says at pp. 504-5:

> "Section 2 of Article 4 of the Federal Constitution is as follows: 'The citizens in each State shall be entitled to all the privileges and im-

munities of the citizens in the several states.' By the decisions the word 'privileges' refers to such as are in their nature fundamental and belong of right to the citizens of free government; and among them is the privilege of a citizen of one state to resort to the courts of another state as citizens of such state may do. Thus, in *Chambers* v. *Baltimore & Ohio Railroad Company*, 207 U. S. 142, the Court, in referring to the Constitutional right of the citizens of one state to sue in the Courts of another said: 'It is one of the oldest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it has allowed to its own citizens. The equality of treatment in this respect is not left to depend upon comity between states, but is granted and directed by the Federal Constitution. * * * But, subject to the restrictions of the Federal Constitution the state may determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them. The state policy decided whether and to what extent the state will entertain in its courts transitory actions where the causes of action have arisen in other jurisdictions. Different states have different policies, and the same state may have different policies at different times, but any policy the state may choose to adopt must operate in its own way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is

void, because in conflict with the Supreme Law of the land.

'If it were the policy of this State, evidenced by the decisions of its courts, or fixed by statute, to close its court, both as to citizen plaintiffs and non-citizen plaintiffs, against transitory causes of actions for torts committed in other states, a refusal to entertain jurisdiction would not violate the constitution. Such is not the policy of this state. If a citizen of our state has a cause of action for tort committed against him in Iowa by the Northwestern Railroad Company, the doors of our courts are not closed against him. *The question for decision is made plain and its solution certain if we make and answer this inquiry: Why is the relator denied access to our Court's? It is not because of the nature of his cause of action. It is not because it arose in Iowa. It is because he is a citizen of Iowa. Therefore, the refusal is violative of the Constitution. It is not a matter of comity. There is no question of discretion.*'

In the *Chambers* case three of the judges dissented. The conclusion which we have reached is the necessary result of both the prevailing and dissenting opinions. The subject easily lends itself to an exhaustive discussion and review of authorities. It is not worth the while. The one case cited, from the Court of final authority, conclusively determines the question. There was no discretion in the District Court to decline the exercise of jurisdiction.

Let a peremptory writ issue."

How the "anomalous" practice of New York Courts, *no matter how long established*, can be maintained in

face of Section 2 of Article 4 of the Federal Constitution, in view of this Court's decision to the contrary, is beyond all understanding.

The decisions in *Chambers* v. *B. & O. R. R. Co.*, 207 U. S. 142, and *Loftus* v. *P. R. R. Co.*, 107 Ohio S. 352, do not in the slightest degree support the contention of the defendant, but rather that of the petitioner.

In the *Chambers* case the plaintiff, prior to the Federal Employers' Liability Act, instituted a cause of action in the Courts of Ohio, not existing at Common Law but granted by the Statutes of the State of Pennsylvania, to recover damages for the death of her husband caused by negligence. Plaintiff and her husband at the time of the injuries and death were citizens of Pennsylvania and the wife continued to be such, and the injuries and death occurred in Pennsylvania. Mr. Justice Moody, in the United States Supreme Court, calls attention to the fact that the Statute of Ohio provides that "Whenever the death of a citizen of this state has been or may be caused by wrongful act, etc., in another state * * * for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state—such right of action may be enforced in this state within the time prescribed, etc., by statute of such other state—." * * * "There was no other statutory provision on this subject." The Supreme Court of Ohio held that the action authorized by this statute for a death occurring in another state was only when the death was that of a citizen of Ohio; that the common law of the state forbade such action and that as the person for whose death damages were sought was not a citizen of Ohio the action would not lie.

This *Chambers* decision is based upon the undisputed fact that the plaintiff had no cause of action at com-

mon law in any state, and such *an action could only be brought in Ohio for the death of a citizen of Ohio.*

We may ask what possible application can this decision have to the case at bar where concededly our State Supreme Court has general jurisdiction of actions to recover damages resulting from death caused by negligence or wrongful act and must entertain actions so brought by residents and citizens of New York, and the Federal Employers' Liability Act in and of itself creates such a cause of action, and confers such jurisdiction, except in what Mr. Justice Moody, writing the controlling opinion, says at page 148:

> "In the decision of the merits of the case there are some fundamental principles which are of controlling effect. The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and directed by the Federal Constitution. * * *."

Mr. Justice Harlan in his dissenting opinion in which two Justices concurred, says at page 154:

> "It is not necessary to fully enumerate the privileges and immunities secured against hostile discrimination by the constitutional provision in question. All agree that among such privileges and immunities are those which, under our institutions, are fundamental in their nature. I

> cordially assent to what is said upon this point in the opinion just delivered for the majority of the court * * * Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other States is void, because in conflict with the supreme law of the land."

Furthermore, the New York State Statute makes no such limitation limiting plaintiffs in New York State Courts to an action to recover damages for the death of a citizen of New York (Decedent's Estate Law, Sec. 130.)

In the case at bar, however, the plaintiff is not suing to recover damages resulting from death caused by negligence, but is merely suing for personal injuries caused by negligence, a cause of action of which New York State courts concededly have jurisdiction at common law, and by statute. (*Robinson* v. *Oceanic Steam Navigation Co.*, 112 N. Y. 351); *McCormack* v. *P. R. R.*, 49 N. Y. 303; *DeHart* v. *Hatch*, 3 Hun. 375; Colonial Statutes creating the New York Supreme Court, May 6, 1691, 1 Col. Laws, pp. 226, 229, etc.).

In the *Loftus* case, *supra*, the plaintiff, a minor employee of defendant, (a Pennsylvania railroad corporation) and a resident of Pennsylvania, was injured in that State and brought suit in the Court of Common Pleas in Ohio under the Federal Employers' Liability Act. The Ohio Venue Statute, Section 11273 (109 O. L. 81) provides in substance that any action against a railroad company must be brought in the County in which the cause of action arose, or in the County in which the claimant resided at the time the cause of action arose, or certain adjoining or nearby counties.

The Supreme Court of Ohio held that this action applied not only to non-residents, but also residents of

the State of Ohio, and that the State Legislature, by the passage of such an act, had limited the general jurisdiction of the Ohio Courts in actions against railroad companies, and had made such restriction as strong against its own citizens as against non-citizens, and that therefore this Venue Act did not violate Section 2 of Article 4 of the Federal Constitution, which, so far as relevant, provides "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

The Court held that this Venue Act did not prevent a citizen of any other state from bringing an action under circumstances permitting an Ohio resident to bring a similar suit, and that is the distinction between the *Loftus* case and the case at bar.

We do not claim that the venue provisions of the Civil Practice Act do not apply to a non-resident's action of this kind. For example, if the plaintiff does not sue in the proper county, the Supreme Court of New York may direct the removal of the case to the proper county, but the Supreme Court generally, has no right to decline jurisdiction of this cause of action which it has, because it is also conferred by the Acts of Congress and treat the action so conferred like an action conferred by the Legislature of a sister state.

Properly considered, the *Loftus* case merely holds that the Federal Act does not confer upon a non-resident plaintiff injured outside of said state a greater right than a citizen of Ohio injured in Ohio. Any construction of the decision or opinion in the *Loftus* case to the effect that the Courts of Ohio could decline jurisdiction of an action brought by an injured claimant under the Federal Employers' Liability Act if the Legislature of Ohio had not limited the general jurisdiction of its own courts in actions against railroad companies as to residents and non-residents

alike, would be absolutely in conflict with the decision of this Court in the *Mondou* case, 223 U. S. 1; 57-59; and would have to be disregarded.

The case of *Walton* v. *Pryor*, 266 Ill. 263, has no application to the case at bar. There the plaintiff sued, under the Federal Employers' Liability Act, to recover damages for death caused by negligence. It appears that the Illinois Statute provides: "No action shall be brought or prosecuted in this state to recover damages for death occurring outside of this state" (Laws 1903, page 217).

Of course, no such statute exists in the State of New York. (Decedent's Estate Law, Sec. 130).

In the *Walton* case the Court held that inasmuch as the state statute prevented a citizen of Illinois from bringing an action to recover damages in Illinois for a death occurring outside of that state, it did not accord to its citizens any greater rights than the citizens of other states, and thereby did not violate any of the provisions of the Federal Constitution above cited.

In *St. Louis* v. *Taylor*, 210 U. S. 281, the action was brought before the Federal Employers' Liability Act. It was based, however, on the Federal Safety Appliance Act, which did not confer concurrent jurisdiction upon the State Courts, as does the specific provisions of the Federal Employers' Liability Act. There the Courts of Arkansas held that they had jurisdiction, and this Court held that it could not review this question. This was an action brought in the State Court of Arkansas to recover damages for death occurring in Indian Territory, resulting from negligence. It appears that in Indian Territory, contrary to the doctrine of common law, a right of action for death exists by statute.

It is difficult to see how this opinion is in anyway relevant to the case at bar.

Of course, it must always be remembered that the Statutes of New York have not forbidden non-resident plaintiffs from suing in the courts of our State, foreign corporations doing business in New York for a cause of action arising outside of the State of New York. Upon the contrary, so far as the Statute is concerned, it is expressly authorized. (Sec. 47, Gen'l. Corp'n. Law, Subdiv. 4.)

It is true, of course, that New York courts have held that this merely permits but does not compel the Court to exercise the jurisdiction.

But these decisions are contrary to the greater weight of authority and do not at all effect the question when a person suing has raised the rights guaranteed to him under the Federal Constitution.

Steed v. *Harvey*, 18 Utah 367;
Strander v. *West Virginia*, 100 U. S. 303;
Denick v. *Railroad Co.*, 103 U. S. 11;
Ward v. *Maryland*, 12 Wallace 430;
Cofrode v. *Circuit Judge*, 79 Mich. 342;
Corfield v. *Coryell*, 4 W. C. C. 380-381;
State ex rel. Prall v. *District Court of Waseca County*, 126 Minn. 501.

The petitioner raises the Federal question that the policy of New York and Section 47 of the General Corporation Law violates if they are held to give New York Courts any discretion in actions of the nature of the one at bar, Section 2 of Article 4 of the Federal Constitution, which provides that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

Insofar as litigation is concerned this provision of the Federal Constitution, when reduced to its last analysis, plainly means that no state can grant privileges

to its own citizens in its courts greater than those accorded the citzens of other states of the Union, and can impose no greater limitations upon citizens of other states than upon its own citizens; and this Section 47 of the General Corporation Law if it imposes greater limitations does deprive citizens of other states of privileges and immunities granted to the citizens of the State of New York in the courts of that state, and therefore violates this provision of the Federal Constitution.

In *Canadian Northern Ry. Co.* v. *Eggen*, 252 U. S. 553, it was held that the privileges and immunities clause of the United States Constitution, Article 4, Section 2, protects rights which are in their nature fundamental, including the rights of a citizen of one state to institute and maintain actions in the courts of another, and that non-resident litigants must be given access to the Courts of the State, upon terms which in themselves are reasonable and adequate, although they may not be exactly the same as are accorded to resident citizens.

It is again to be borne in mind that the Statute of the State of New York, Subdivision 4 of Section 47 of the General Corporation Law does not by its terms deprive this plaintiff of the right to bring this action against the defendant in the New York State Courts in the precise manner in which he has brought it, but, on the contrary, specifically seems to authorize the institution by this plaintiff of this very action. The difficulty however, is, that our courts have read into it that it merely means that the New York Courts, may in their discretion refuse to entertain such jursidiction and thus deny the plaintiff any access to our courts in such an action as this.

It is these rulings and this construction of our New York Statute which violates the constitutional provision

referred to, because the defendant contends not merely that the plaintiff may be obliged to sue in a particular county or part of the State of New York, but that he cannot sue in our Supreme Court at all, and that his complaint must be dismissed.

It is with this contention that the plaintiff is in violent conflict.

In this *Canadian R. Co.* v. *Eggen* case *supra*, the United States Supreme Court states

> "the principle on which this holding rests is that the constitutional requirement is satisfied if the non-resident is given access to the courts of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens. The power is in the Courts, ultimately in this court, to determine the adequacy and reasonableness of such terms."

This, of course, holds that if the non-resident is denied access to our courts under these circumstances that such denial, whether by a statute or judicial decision, is in violation of the plaintiff's constitutional rights.

A similar subject was considered and discussed at length in a very recent opinion by Cardozo, *C. J.*, in *Smith* v. *Loughman*, 245 N. Y. 486, where it was held that the statute imposing a different tax rate on the inheritance transfers of non-residents than that on residents was unconstitutional and in violation of this provision of the United States Constitution.

Likewise the subject is also referred to in *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60, where it was held that an income tax law which allowed exemptions

to residents, with increases for married persons and dependents and allowed no equivalent exemptions to non-residents, operates to abridge the privileges and immunities of the citizens of other states in violation of this provision of the Federal Constitution.

However, as heretofore stated, the *Mondou* case, *supra*, clearly holds that the contention that the Courts of this State are free to decline jurisdiction in a case of this kind is "quite inadmissible," and that when Congress established a policy it established a "policy for all the States," and that the imposition of such jurisdiction would probably not be attended by any appreciable inconvenience, but even if so "it affords no reason for declining the jurisdiction, conferred by law," and the claimant's rights under the Federal Act may be enforced "as of right in the courts of any of the states where jurisdiction as prescribed by local laws is adequate to the occasion". (Paraphrase by appellant.)

We assume that this Court will not question the proposition that the jurisdiction of the Courts of New York State, as prescribed by our laws, is adequate to the occasion (*Gregonis* v. *Philadelphia and Reading Coal & Iron Company*, 235 N. Y. 152.)

The debates in Congress when the Federal Employers' Liability Act was under consideration clearly shows that Congress deliberately intended to allow the injured employee or his widow and children to bring suit in a State where the defendant would not be powerful and influential, and that is why the Statute specifically provided that he might sue in the district (1) where the accident happened; (2) where the defendant resides; or (3) in the district where the defendant is doing business.

Congressional Record, Vol. 45, Part 4, 61st Congress, 2nd Session, page 4634.

"The corporation being an inhabitant of the State which creates it, it might follow that the plaintiff would have to travel a long distance in order under certain conditions to bring his action. If this bill should be passed the law will be remedied in that respect enabling the plaintiff to bring his action where the cause of action arose *or where the defendant may be doing business.*"

"*The bill enables the plaintiff to find the corporation at any point or place or State where it is actually carrying on business and there lodge his action if he chooses to do so.*"

Vol. 45, Part 3, page 2255.

"It (meaning the bill) makes it much more convenient for the plaintiff to bring his suit by providing that he may sue in his own district or defendant's district or where the injury occurred *or where the defendant may be found.*"

"And it gives the state courts the right to administer the law."

It is the duty of the Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance *Church of Holy Trinity* v. *U. S.*, 143 U. S. 457; *Ozawa* v. *U. S.*, 260 U. S. 178; *Heydenfeldt* v. *Daney Gold & S. Min. Co.*, 93 N. S. 634.

Section 2 of Article 4 of the United States Constitution, granting the citizens of each state all the privileges and immunities of the citizens in the several states, and the second clause of Article 6 of the Federal Constitution, which provides that the Federal Constitution and that the Laws of the United States

made pursuant thereto "shall be the supreme law of the land *and the judges in every state shall be bound thereby* anything in the Constitution or Laws of any state to the contrary notwithstanding" are parts of the original United States Constitution, and are not any part of the amendments with reference to due process of law; and we respectfully submit that it is the duty of the courts of this state and all of the judges thereof to comply with their oath of office and to obey the command of this Constitution.

As stated by Judge Shiras, in *Murray* v. *Chicago and N. W. Ry. Co.*, (62 Fed. Rep. 24):

> "The discussion by Judge Baldwin of the right of a state court to refuse to enforce such a statute as the one in question and his reference to the 'public policy' of a State as a ground for such a refusal to take jurisdiction indicate clearly that he had in mind the decisions as to the exercise of 'comity' by the courts of one State in taking jurisdiction of foreign laws; that is, the laws of another State. There are many decisions upon the right of a party to enforce in one State the statutes of another.
>
> "If this was such a case, there is authority for the position taken in the *Hoxie* case. But the decision in these cases is justified on the ground that statutes of other States (foreign laws) have not extraterritorial force. Such decisions have no bearing when the question before a state court is the enforcement of a Federal law. This is not a mere question of comity; it is a question of authority."

Therefore, we contend that this Court should hold that the Constitution of the United States and the Fed-

eral Statutes constitute the Supreme Law of New York State and the individual policy of that State contrary thereto must yield to this Supreme Law, for this Court has held, in *Slocum* v. *N. Y. Life Ins. Co.*, 228 U. S. 364; "*The contention that to hold a statute unconstitutional would nullify statutes in existence for many years is not of great weight.*" If such grave words apply to statutes of a Legislature or the Congress of the United States, they should have like application to the decisions of even the highest State Courts.

As a closing argument the words of two of the greatest Judges America has ever produced are very appropriate and may well be followed by this Court.

Mr. Chief Justice Marshall: "This Court can be insensible neither to the magnitude nor the delicacy of the question. However irksome the task may be, this is a duty from which we dare not shrink."

Mr. Justice Story: "I entertain great respect for the legislature, whose acts are in question. I entertain no less respect for the enlightened tribunal whose decision we are called upon to review. It is not for judges to listen to the voice of popular appeal. We have nothing to do but, our duty, pronounce the law as we find it, and having done this our justification must be left to the impartial judgment of our country."

CONCLUSION.

The petitioner respectfully prays that this Court by its supervisory power reverse the judgment appealed from and for such other relief as may be just.

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APPENDIX A.

House Report of February 22, 1910, Senate Report of March 23, 1910, to Accompany H. R. 17263.

The Senate report contains, in part, the following:

> "In declaring that the jurisdiction of the United States shall be 'concurrent with the Courts of the several states' Congress is clearly within its rights and powers.
>
> The first precedent for such declaration is found in the action of the First Congress.
>
> This precedent has repeatedly been followed in Federal Legislation. Thus clearly was it established by those who understood the full scope and operation of the Constitution of the United States, that the 'supreme law of the land' did not lose any of its imperative obligation at the door of a state court.
>
> The express declaration of the United States Constitution says of laws enacted by Congress in pursuance of its delegated powers, '*and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.*'
>
> This declaration of the Constitution is not meaningless. That the 'judges in every State shall be bound' by a Federal law imposes a binding duty to enforce it.
>
> ***This provision leaves no discretion to a judge of a state court to deny justice to a suitor because his right is based on a Federal law.***
>
> Does the fact that state courts are 'established by a sovereign power and maintained at its expense' permit denial of enforcement in such

courts of a right founded on a Federal statute? This question is squarely answered in a case which, strangely enough, is cited by the court in the *Hoxie* case. (*Claflin* v. *Houseman*, 93 U. S. 130.)

It is difficult to understand why the Connecticut court cites the case of *Claflin* v. *Houseman* as authority for the remarkable position taken, for a careful consideration of the opinion of Mr. Justice Bradley in that case shows conclusively that the opinion affords no basis for the contention made by the court that the state court is not authorized and required to enforce Federal statutes.

The Federal law is imperative, mandatory, and paramount over every foot of the soil of every State. It is in no sense foreign when its application or enforcement is sought in the courts of a State. No policy of a State can impair its imperative obligation. No official of a State, sworn to support the Constitution of the United States can deny the enforcement of a statute of the United States, made in pursuance of the United States Constitution. Such law by the the Constitution is made 'the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding.'

How can a judge of a state court deny the imperative obligation of a Federal statute on any occasion in his Court? Before he can lawfully assume the duties as such state judge he is bound by oath in obedience to the express requirements of the Constitution (Art. VI, sec. 3) to support the Constitution of the United States, which in express terms makes Federal statutes 'the supreme law of the land,' and the judges in

every State shall be bound thereby, 'anything in the Constitution or laws of any State to the contrary notwithstanding.'

Federal laws are not dependent upon the judicial courtesy of state courts, to be enforceable in the courts of some States and to be refused enforcement in others. They are 'the supreme law of the land', and the judges in every State shall be bound thereby.

In the case of *Claflin* v. *Houseman*, 93 U. S. 130, Mr. Justice Bradley said:

The general question, whether state courts can exercise concurrent jurisdiction with the federal courts in cases arising under the Constitution, laws, and treaties of the United States has been elaborately discussed, both on the bench, and in published treatises; sometimes with a leaning in one direction and sometimes in the other; but the result of these discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction where it is not excluded by express provision or by incompatibility in its exercise arising from the nature of the particular case.

When we consider the structure and true relations of the federal and state governments, there is really no just foundation for excluding the state courts from all such jurisdiction.

The laws of the United States are laws of the several States, and just as much binding on the citizens and courts thereof as state laws are.

The United States is not a foreign sovereignty as regards the several States, but is a concurrent and, within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jur-

isdiction in the State; concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction. Thus a legal or equitable right acquired under state laws may be prosecuted in the state courts, and also, if the parties reside in different States, in the federal courts.

So rights, whether legal or equitable, acquired under the laws of the United States may be prosecuted in the United States courts or in the state courts competent to decide rights of the like character and class, subject, however, to this qualification, that where a right arises under a law of the United States, Congress, may, if it see fit, give to the federal courts exclusive jurisdiction.

See remarks of Mr. Justice Field in *The Moses Taylor* (4 Wall., 429; 71 U. S., XVIII, 401) and Story, *J.*, in *Martin* v. *Hunter*, (1 Wheat., 334), and Mr. Justice Swayne in *Ex parte McNeil* (13 Wall., 236; 80 U. S., XX, 624).

This jurisdiction is sometimes exclusive by express enactment and sometimes by implication.

If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court.

The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief, because it is subject also to the laws of the United States, and is

just as much bound to recognize these as operative within the States as it is to recognize the state laws. The two together form one system of jurisprudence which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.

The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the state and federal governments.

It is often the cause for the consequence of an unjustifiable jealousy of the United States Government which has been the occasion of disastrous evils to the country.

It is true the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney in the case of *Ableman* v. *Booth* (21 How., 506; 62 U. S., XVI 169), and hence state courts have no power to revise the action of the federal courts, nor the federal the state, except where the Federal Constitution or laws are involved. But this is no reason why state courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent and not denied. * * *

Chancellor Kent, in his Commentaries (1 Com., 400), says:

In judicial matters the concurrent jurisdiction of the state tribunals depends altogether upon

the pleasure of Congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject-matter can constitutionally be made cognizable in the federal courts; and that, without an express provision to the contrary, the state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject matter.

To quote from Cooley's Principles of Constitutional Law, pages 32-33:

A state law must yield to the supreme law, whether expressed in the Constitution of the United States or in any of its laws or treaties, so far as they come in collision, and whether it be a law in existence when the 'supreme' law' was adopted or enacted afterwards. The same is true of any provision in the constitution of any State which is found to be repugnant to the Constitution of the Union. And not only must 'the judges in every State' be bound by such supreme law, but so must the State itself, and every official in all its departments, and every citizen.

And in the notes, pages 33-35, we read:

The United States is a government with authority extending over the whole territory of the Union, acting upon the States and the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it. (*Tennessee* v. *Davis*, 100 U. S. 257, per strong, *J.*, see also *In re Debs*, petitioner, 158 U. S., 564:

Logan v. *United States*, 144 U. S. 263; • • • *Dodge* v. *Wolsey*, 18 How., 331; *Jefferson Branch Bank* v. *Skelly*, 1 Black., 436; *Cummings* v. *Missouri*, 4 Wall., 277; *Railroad Co.* v. *McClure*, 10 Wall., 511; *White* v. *Hart*, 13 Wall., 646; *Gunn* v. *Harry*, 15 Wall., 610; *Pacific Railroad Co.* v. *Maguire*, 20 Wall., 36; *St. Louis, &c., Ry. Co.*, v. *Vickers*, 122 U. S. 360). A state cannot control the conduct of an agency of the Federal Government within its limits, if the result would be a conflict with national law or an impairment of the efficiency of the agency. (*Davis* v. *Elmira Savings Bank*, 161 U. S. 275; *McClellan* v. *Chipman*, 164 U. S., 347. Compare *Reagan* v. *Mercantile Trust Co.*, 154 U. S., 413.)

Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislature as if they had been expressly forbidden to act. (Marshall, *C. J.*, in *Sturges* v. *Crowninshield*, 4 Wheat., 122).

In Robb v. *Connolly* (111 U. S., 637), Justice Harlan said:

"Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof. Wherever those rights are involved in any suit or proceedings before them; for the judges of the state courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, 'any

thing in the constitution or laws of any State to the contrary notwithstanding.' If they fail therein, and withhold or deny rights or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination.

In re Matthews, (122 Fed. Rep., 248, p. 251):

The second clause of article 6 of the Federal Constitution is in these words:

"This Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

A recent writer in the American Law Review has had this to say concerning this clause, to-wit:

"This provision presupposes that the judges in every State will have some knowledge of the Constitution, the laws, and the treaties of the Federal Government by which they are thus to be bound; and this community of interest and obligation obliviously makes the judicial officers of the several States, in a certain high sense, members of the federal judiciary."

In the case of *Robb v. Connolly* (111 U. S., 637; 4 Sup. Ct., 551; 28 L. Ed., 542), Mr. Justice Harlan said:

"A state court of original jurisdiction, having the parties before it, may, consistently with existing federal legislation, determine cases at law or in equity arising under the Constitution and

laws of the United States, or involving rights dependent upon such Constitution or laws."

In the case of *Ex parte Royall, supra*, Mr. Justice Harlan said:

"In *Taylor* v. *Carryl* (20 How., 595; 15 L. Ed., 1028) it was said to be a recognized portion of the duty of this court (and, we will add, of all other courts, national and state) 'to give preference to such principles and methods or procedure as shall seem to conciliate the distinct and independent tribunals of the States and of the Union, so that these may co-operate as harmonious members of a judicial system, co-extensive with the United States, and submitting to the paramount authority of the same Constitution, laws, and federal obligations.' And in *Covell* v. *Heyman* (111 U. S., 182; 4 Sup. Ct., 358; 28 L. Ed., 390) it was declared 'that the forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise toward each other, whereby conflicts are avoided by avoiding interference with the process of the other, is a principle of comity, with perhaps no higher sanction than the ability of which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and of law, and therefore of necessity.'

Pomeroy, 'Introduction to the Constitution Laws of the United States,' third edition, 503. Section 743:

Strip the National Government of an authority to apply a sanction commensurate with its power to legislate, and just so far we subtract from that legislation the necessary element of a command. Strip the Government of the ability to make that sanction supreme, and we equally

invalidate the authority of the legislative utterance. This attribute of supremacy would be destroyed by permitting the state courts, for example, to decide upon the effect of national laws, and by making their decisions in the particular State where made of an equal authority with those pronounced upon the same subject by the national judges. This difficulty thus to be apprehended from the action of state tribunals could only be prevented in one of two ways—either by removing from them the power to decide at all upon rights and duties which spring from the national legislation and conferring the function exclusively upon the United States courts, or by permitting the state judiciary to exercise a jurisdiction in such cases, but making that jurisdiction subordinate to the authority of the national courts and rendering the local decisions reviewable by the United States judges, who could in this manner enforce their attribute of supremacy in relation to the matters under consideration.

In theory the former of these plans would have been the more simple and perfect. But it was perhaps best, from some motives of expediency, that the Constitution should not expressly determine between these two methods, but should clothe Congress with the power of making such a choice of the alternatives as should be found to promote the convenience of the people. Congress possesses such an authority; it might make all this jurisdiction exclusive in the national courts, but has done so only in particular cases; it might suffer the state tribunals to exercise a complete concurrent power, subject to an equally complete liability to review, but has done so only to a limited extent. Whether Congress shall

adopt one or the other alternative is a mere question of policy; it may do either. * * *

The Supreme Court of the United States, in *Teal* v. *Fulton* (53 U. S., 292), referring to this subject, said:

'We will add that the legislation of Congress immediately after the Constitution was carried into operation confirms the conclusion of the learned judge. We find in the twenty-fifth section of the judiciary act of 1789, under which this case is before us, that such a concurrent jurisdiction in the courts of the States and the United States was contemplated, for its first provision is for a review of cases adjudicated in the forum, 'where is drawn in question the validity of a treaty or a statute of, or an authority exercised by, the United States, and the decision is against their validity.'

But it is said that the courts of New York had not jurisdiction to try the case. The objection may be better answered by reference to the laws of the United States in respect to the services to be rendered in the transmission of letters and newspapers by mail and by the Constitution of the United States than it can by any general reasoning upon the concurrent civil jurisdiction of the courts of the United States and the courts of the States, or concerning the exclusive jurisdiction given by the Constitution to the former.

The United States undertakes, at fixed rates of postage, to convey letters and newspapers for those to whom they are directed, and the postage may be prepaid by the sender or be paid when they reach their destination by the person to whom they are addressed. When tendered by the latter or by his agent he has the right to the

immediate possession of them, though he has not had before the actual possession. If they be wrongfully withheld for the charge of unlawful postage it is a conversion for which suit may be brought. His right to sue existing, he may sue in any court having civil jurisdiction of such a case, unless for some cause the suit brought is an exception to the general jurisdiction of the court.

Now, the courts of New York having jurisdiction in trover, the case in hand can only be expected from it by such a case as this having been made one of exclusive jurisdiction in the courts of the United States by the Constitution of the United States. That such is not the case, we can not express our view better than Mr. Justice Wright has done in his opinion in this case in the court of appeals. After citing the second section of the third article of the Constitution, he adds. 'This is a mere grant of jurisdiction to the federal courts, and limits the extent of their power, but without words of exclusion or any attempt to oust the state courts of concurrent jurisdiction in any of the specified cases in which concurrent jurisdiction existed prior to the adoption of the Constitution. The apparent object was not to curtail the powers of the state courts, but to define the limits of those granted to the federal judiciary.'

We will add that the legislation of Congress, immediately after the Constitution was carried into operation, confirms the conclusion of the learned judge. We find in the twenty-fifth section of the judiciary act of 1789, under which this case is before us, that such a concurrent jurisdiction in the courts of the States and of the United States was contemplated, for its first

provision is for a review of cases adjudicated in the former, 'Where is drawn in question the validity of a treaty or statute or, or an authority exercised under the United States, and the decision is against their validity.' We are satisfied that there was no error in the decision of the court of appeals in this case, and the same is affirmed by this court.

In the case of *The Moses Taylor* (1866, 4 Wall., U. S., 428) the court said:

* * * The judiciary act of 1789, in its distribution of jurisdiction to the several federal courts, recognizes and is framed upon the theory that in all cases to which the judicial power of the United States extends Congress may rightfully vest exclusive jurisdiction in the federal courts. It declares that in some cases, from their commencement, such jurisdiction shall be exclusive; in other cases it determines at what stage of procedure such jurisdiction shall attach, and how long and how far concurrent jurisdiction of the state courts shall be permitted. Thus, cases in which the United States are parties, civil causes of admiralty and maritime jurisdiction, and cases against consuls and vice-consuls, except for certain offenses, are placed, from their commencement, exclusively under the cognizance of the federal courts.

On the other hand, some cases, in which an alien or a citizen of another State is made a party, may be brought either in a federal or a state court, at the option of the plaintiff; and if brought in the state court may be prosecuted until the appearance of the defendant, and then, at his option, may be suffered to remain thereto, or may be transferred to the jurisdiction of the federal courts. Other cases, not included under

these heads, but involving questions under the Constitution, laws, treaties, or authority of the United States, are only drawn within the control of the federal courts upon appeal or writ of error, after final judgment. By subsequent legislation of Congress, and particularly by the legislation of the last four years, many of the cases, which by the judiciary act could only come under the cognizance of the federal courts after final judgment in the state courts, may be withdrawn from the concurrent jurisdiction of the latter courts at earlier stages, upon the application of the defendant. The constitutionality of these provisions can not be seriously questioned, and is of frequent recognition by both state and federal courts.

In *Ex parte Siebold* (100 U. S.) the court said:

The power of Congress, as we have seen, is paramount, and may be exercised at any time and to any extent which it deems expedient; and so far as it is exercised and to further the regulations effected supersede those of the State which are inconsistent therewith.

As a general rule, it is no doubt expedient and wise that the operations of the state and national governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. It should never be made to override the plain and manifest dictates of the Constitution itself.

We can not yield to such a transcendental view of state sovereignty. The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every

State owes obedience, whether in his individual or official capacity.

There are very few subjects, it is true, in which our system of government, complicated as it is, requires or gives room for conjoint action between the state and national sovereignties. Generally, the powers given by the Constitution to the Government of the United States are given over distinct branches of sovereignty from which the state governments, either expressly or by necessary implication, are excluded.

But in this case expressly, and in some others by implication, as we have seen in the case of pilotage, a concurrent jurisdiction is contemplated, that of the State, however, being subordinate to that of the United States, whereby all question of precedency is eliminated.

In a comparatively recent case the Supreme Court of the United States, in the case of *Defiance Water Co.* v. *Defiance* (191 U. S., 194), Chief Justice Fuller, in delivering the opinion of the court, used the following language:

Moreover, the state courts are perfectly competent to decide federal questions arising before them, and it is their duty to do so. (*Robb* v. *Connolly*, 111 U. S., 624, 637, 28 L. Ed., 542, 546, 4 Sup. Ct. Rep. 544; *Missouri P. R. Co.* v. *Fitzgerald*, 160 U. S., 556, 583, 40 L. Ed., 336, 543, 16 Sup. Ct. Rep., 389.)

And we repeat, the presumption is in all cases that the state courts will do what the Constitution and laws of the United States require. (*Chicago & A. R. Co.* v. *Wiggins Ferry Co.*, 108 U. S., 18, 27 L. ed., 636, 1 Sup. Ct. Rep., 614, 617; *Shreveport* v. *Cole*, 129 U. S., 36, 32 L. Ed., 589, 9 Sup. Ct. Rep., 210; *Neal* v. *Delaware*, 103 U. S. 370, 389, 26 L. Ed. 567, 571; *New Orleans* v.

Benjamin, 153 U. S., 411, 424, 38 L. Ed. 764, 769, 14 Sup. Ct. Rep., 905.)

If error supervenes the remedy is found in paragraph 709 of the Revised Statutes. (U. S. Comp. Stat., 1901, p. 575.)

Mr. Justice Shiras, in commenting upon the concurrent jurisdictional power of the state and federal courts, in the case of *Murray* v. *Chicago and N. W. Ry. Co.* (62 Fed. Rep., 24), said:

A further point is made in support of the demurrer, to the effect that this court succeeds only to the jurisdiction of the state court in which the action was originally brought, and that state courts have no jurisdiction over cases arising out of interstate commerce, the argument being that as the State can not legislate touching interstate commerce, the state courts are without power to determine cases of the like character. This position is not well taken. The limitations upon the legislative power of the nation and of the several States do not necessarily apply to the judicial branches of the national and state governments. The legislature of a State can not abrogate or modify any of the provisions of the Federal Constitution nor of the acts of Congress touching matters within congressional control, but the courts of the State, in the absence of a prohibitory provision in the Federal Constitution or acts of Congress, have full jurisdiction over cases arising under the Constitution and laws of the United States.

The courts of the States are constantly called upon to hear and decide cases arising under the Federal Constitution and laws, just as the courts of the United States are called upon to hear and decide cases arising under the law of the State when the adverse parties are citizens of differ-

ent States. The duty of the court is to explain, apply, and enforce the existing law in the particular cases brought before them. If the law applicable to a given case is of felonious origin, the legislature of the State can not abrogate or change it, but the courts of the State may apply and enforce it; and hence the fact that a given subject, like interstate commerce, is beyond legislative control does not, *ipso facto*, prevent the courts of the State from exercising jurisdiction over cases which grow out of this commerce. Had this action remained in the state court in which it was originally brought, the court would have had jurisdiction to hear and determine the issues between the parties, because Congress had not enacted that jurisdiction over cases of this character is confined exclusively to the courts of the United States, and therefore the jurisdiction of the state court was full and complete.

The discussion by Judge Baldwin of the right of a state court to refuse to enforce such a statute as the one in question and his reference to the 'public policy' of a State as a ground for such a refusal to take jurisdiction indicate clearly that he had in mind the decisions as to the exercise of 'comity' by the courts of one State in taking jurisdiction of foreign laws; that is, the laws of another State. There are many decisions upon the right of a party to enforce in one State the statutes of another.

If this was such a case, there is authority for the position taken in the *Hoxie* case. But the decision in these cases is justified on the ground that statutes of other States (foreign laws) have not extraterritorial force. Such decisions have no bearing when the question before a state court is the enforcement of a Federal law. This is not a mere question of *comity*; it is a question of *authority*."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 312.

CHARLES L. DOUGLAS, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Brief on Re-Argument in Support of Writ of Certiorari to the Supreme Court of the State of New York.

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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 312.

CHARLES L. DOUGLAS, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Brief on Re-Argument in Support of Writ of Certiorari to the Supreme Court of the State of New York.

This case was originally argued on January 16, 1929, and thereafter on February 18, 1929, the Court directed re-argument and at the same time granted leave to the Attorney General of the State of New York to file a brief and take part in the oral argument.

I.

The Opinions of the Courts Below.

The learned Special Term rendered the following unreported opinion:

> "The Court of Appeals in the *Murnan* case (246 N. Y., 244) has settled the question as to the discretionary power of the Supreme Court

> at Special Term to grant this motion, and I think that that discretion should be so exercised as to relieve the Courts of the State of the burden of cases that arise in other states and in which none of the parties is a resident of this State. Motion granted" (R., 16-17).

The Appellate Division of the Supreme Court rendered a memorandum opinion, reported in 223 App. Div., 782, as follows:

> "Order granting defendant's motion to set aside service of summons and complaint and dismiss action affirmed, with ten dollars costs and disbursements" (R., 18).

The Court of Appeals rendered the following opinion on May 29, 1928, 248 N. Y., 580:

> "Judgment affirmed, with costs, on authority of *Murnan* v. *Wabash Railway Co.*, 246 N. Y. 244" (R., 1).

II.

Jurisdiction.

1. The judgment and order of the Court of Appeals to be reviewed is dated May 29, 1928 (R., 1-2).

2. Petitioner contends that he was entitled to maintain this action in the New York Supreme Court, Westchester County, against the defendant, as a matter of right in accordance with Article 4, Section 2, of the United States Constitution, providing:

> "The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states."

And the second clause of Article 6 of the United States Constitution, providing:

> "This Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in each state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

And the second clause of Section 6 of the Federal Employer's Liability Act, as amended by the Laws of 1910, Chapter 143, Section 1, 36 U. S. Stat., 291:

> "Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of the commencement of such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any Court of the United States. * * * "

And Section 46 of the General Corporation Law of New York reads as follows:

> "SEC. 46. Action against foreign corporation. An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action."

And Section 47 of the General Corporation Law of New York reads as follows:

> "SEC. 47. Action against foreign corporation by another foreign corporation or non-resident.

An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases *only*: (Italics ours.)

1. Where the action is brought to recover damages for the breach of a contract made within the state, or relating to property situated within the state, at the time of the making thereof.

2. Where it is brought to recover real property situated within the state, or a chattel, which is replevied within the state.

3. Where the cause of action arose within the state, except where the object of the action is to affect the title to real property situated without the state.

4. *Where a foreign corporation is doing business within this state.* (Italics ours.)

Within the meaning of this section, a foreign corporation shall not include a corporation located in this state and created by or under the laws of the United States."

And Section 229 of the Civil Practice Act, which reads as follows:

"SEC. 229. Personal service of summons upon foreign corporation. Personal service of summons upon a foreign corporation must be made by delivering a copy thereof, within the state, as follows:

1. To the president, vice-president, treasurer, *assistant treasurer*, secretary or assistant secretary; or, if the corporation lack either of those officers, to the officer performing corresponding functions under another name.

2. *To a person designated for the purpose as provided in section sixteen of the general corporation law.*

3 and 4. * * *." (Italics ours.)

3. The jurisdiction of this Court is sought to be invoked under Subdivision B of Section 237 of the Federal Judicial Code, as amended, and this Court's granting of petitioner's petition for a Writ of Certiorari.

4. The cases upon which the petitioner based his application for certiorari are as follows:

Mondou v. *N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1, reversing 82 Conn., 373.

Missouri et al. v. *Taylor*, 266 U. S., 200.

Missouri & Pacific R. R. v. *Clarendon Boat Oar Co.*, 257 U. S., 533.

Cole v. *Cunningham*, 133 U. S., 107.

Chambers v. *Baltimore & Ohio R. R. Co.*, 207 U. S., 142.

State ex rel. Watkins v. *North American Land & Timber Co.*, 106 Louisiana, 621.

State ex rel. Prall v. *District Court*, 126 Minn., 501.

III.

Statement of the Case.

The plaintiff, a citizen of the United States, and citizen and resident of the State of Connecticut (R., 17-18), while engaged in the defendant's employ at its Waterbury yards, in the State of Connecticut, in an interstate commerce movement, sustained serious personal injuries on December 1, 1927, and instituted this action pursuant to the Federal Employer's Liability Act, in the Supreme Court, Westchester County, to recover for such injuries (R., 8-9). The summons and complaint were served upon the defendant by delivering the same to one Frank E. Hall, who was *designated*

to receive service of such papers on behalf of the defendant, pursuant to respondent's filed designation in New York, and at the same time was and still is *Assistant Treasurer* of the respondent railroad company (R., 6, 7, 8, 9, 17, 18). (See New York Civil Practice Act, Sec. 229, Sub. 1 and 2; and *Bagdon* v. *Phila. and Reading Coal and Iron Co.*, 217 N. Y. 432, at 438, 439; and *Pomeroy* v. *Hocking Valley R. R. Co.*, 218 N. Y. 530.) It is admitted that the respondent was engaged in business in the State of New York and operated a railroad in Westchester County in that State. Respondent moved before answer to vacate the service and dismiss the action on the ground that the Court's jurisdiction was wholly discretionary, and under the circumstances, since both the plaintiff and defendant were non-residents of the State of New York, and that the action happened wholly outside the State of New York, the Court in the exercise of sound discretion should refuse to entertain this action (R., 5-8).

This view was sustained at Special Term and unanimously affirmed in the Appellate Division (although that Court had previously held to the contrary in *Murnan* v. *Wabash Ry. Co.*, 220 App. Div., 218) and Court of Appeals, pages 1-2, *infra*.

IV.

Specification of Errors.

1. The Court of Appeals, the Appellate Division and Special Term erred in finding and holding that in an action brought under the Federal Employer's Liability Act the Supreme Court of the State of New York has any discretion whatsoever to entertain or decline to entertain jurisdiction of the action.

2. The Court of Appeals, the Appellate Division and Special Term erred in finding and holding that Article 4, Section 2, and the second clause of Article 6 of the United States Constitution do not compel the Supreme Court of the State of New York to entertain jurisdiction of this cause of action as a matter of absolute right, in view of the jurisdiction of said Supreme Court as established by the case of *Gregonis* v. *Philadelphia Coal & Iron Co.*, 235 N. Y., 152.

3. The Court of Appeals, the Appellate Division and Special Term erred in finding and holding that the second clause of Section 6 of the Federal Employer's Liability Act, and Subdivision 4 of Section 47 of the General Corporation Law of the State of New York, do not compel the Supreme Court of the State of New York to take jurisdiction of this cause of action as a matter of absolute right.

V.

ARGUMENT.

Article 4, Section 2, of the United States Constitution guarantees to the citizens of each State all the fundamental privileges and immunities of a citizen of a free government to the same degree, no more and no less, which the citizens of the several States are entitled to as matter of right within their respective States, and inasmuch as the statutes and decisions of New York State authorize a New York citizen to maintain as matter of right an action against a foreign corporation doing business in New York for a tort committed outside said State it necessarily follows that the New York State Court's decisions declining to entertain jurisdiction of a similar action brought by a citizen of a sister State against a foreign corporation under similar circumstances violate the aforesaid provision of the United States Constitution.

From experiences of the original argument in the case at bar before this Court, it appears to the petitioner that there is only one main question involved.

What does Article 4, Section 2, of the United States Constitution guarantee to a citizen of the United States, a citizen and resident of the State of Connecticut, when he resorts to the Supreme Court of the State of New York as a judicial tribunal to adjudicate his rights as such rights are limited by the facts disclosed in this record?

We do not intend to suggest that other questions are unimportant. In fact, all are material to the decision

of the main question, but fortunately they have heretofore been actually decided by either this Court or the Courts of the State of New York, and, therefore, we will not argue such questions but simply refer to decisions to support these collateral issues as they appear.

We do not withdraw any contention previously made in our original brief, or urged upon the original oral argument. Realizing, however, the evident necessity of a more minute analysis of the important constitutional question presented squarely for decision, for the first time, we will attempt to answer all possible opposition by the following argument:

In *State ex rel Prall* v. *The District Court of Waseca County*, 126 Minn. 501, the Court said:

> "If it were the policy of this State, evidenced by the decisions of its courts, or fixed by statute, *to close its court, both as to citizen plaintiffs and non-citizen plaintiffs, against transitory causes of actions for torts committed in other states*, a refusal to entertain jurisdiction would not violate the constitution. Such is not the policy of this state. *If a citizen of our state has a cause of action for tort committed against him in Iowa by the Northwestern Railroad Company, the doors of our courts are not closed against him.* The question for decision is made plain and its solution certain if we make and answer this inquiry: Why is the relator denied access to our Courts? It is not because of the nature of his cause of action. It is not because it arose in Iowa. It is because he is a citizen of Iowa. Therefore, the refusal is violative of the Constitution. It is not a matter of comity. There is no question of discretion" (Italics ours).

We can gather no other meaning from this forceful language than that, if the State of New York allows its own citizens to maintain as of right an action in tort against a foreign corporation when the tort occurred

outside the State that it must allow a like right to non-citizens. The Minnesota Court based its decision on *Chambers* v. *Baltimore & Ohio Railroad Co.*, (207 U. S. 142), and this Court's decision in the latter case indicates very plainly, we believe, that our contention is beyond dispute.

This leads us of necessity to consider the law of the State of New York. We contend, it settled beyond dispute, that the Supreme Court of the State of New York must entertain an action in tort brought by a resident of New York (A citizen of New York must be a resident of New York, United States Constitution, Section 1, 14th Amendment; and Article 1, Sections 1 and 8, Article 2, Section 1, N. Y. Constitution, 1894) against either a natural person or a domestic, *or foreign corporation*, regardless of where the tort occurred, provided service of process can be made within the State of New York, and if the corporation is a foreign corporation that that corporation is actually doing business within the State of New York at the time of the commencement of the action.

Decisions of the New York Court of Appeals are not numerous upon this point, by reason of the fact that the Federal Congress as far back as 1789 (1 Stat. 73) and by subsequent legislation, up to and including Section 71 of the present Judicial Code, provided for the removal of such actions as matter of right to the Federal Courts where a diversity of citizenship and the required amount were present.

But fortunately in the early days of our existence, both national and state, removal of actions from state to Federal Courts was less frequent than at present, when it has become almost a universal rule.

We, however, find instances where actions have been instituted and maintained in the following cases:

Dale v. *Delaware, Lackawanna & Western R. R. Co.*, 73 N. Y. 471. Plaintiff was a resident of the City of

Brooklyn, and on April 3, 1871, was a passenger on one of defendant's trains bound from Montrose Station, New Jersey, to New York City, and was injured as the train passed over the Passaic River, New Jersey. The complaint alleged defendant was a Pennsylvania corporation and lessee of the Morris-Essex Railroad Company, a New Jersey corporation, on whose lines the accident occurred. The answer admitted these allegations. (Court of Appeals original record from its library, Albany, N. Y.)

Smith v. *British and North American Royal Mail Steam Packet Company*, 86 N. Y. 408. In August, 1877, plaintiff took passage from Liverpool, England, to New York City, N. Y., on defendant's steamship "Algeria" and arrived in New York City on October 3, 1877. He was injured on the high seas on September 25, 1877, and lived in New York City. The complaint alleges the defendant is a corporation existing under the laws of the United Kingdom of Great Britain and Ireland, and the answer admits this allegation. (Court of Appeals original record from its library, Albany, N. Y.)

Archer v. *N. Y. N. H. & H. R. R. Co.*, 106 N. Y. 589. Plaintiff was a travelling salesman residing in New York City, and on October 20, 1880, arrived at defendant's station at Hartford, Conn., on a train of the New York and New England Railroad Company. While standing on the station platform he was struck by one of defendant's trains. The complaint alleges the defendant was a corporation of the State of Connecticut, and operated its trains between New York City and Hartford. The answer admits this allegation. (Court of Appeals original record from its library, Albany, N. Y.)

Spooner v. *Delaware, Lackawanna & Western R. R. Co.*, 115 N. Y. 22. Plaintiff, an infant, was a resident

of the City of Brooklyn, N. Y., and while visiting her aunt at East Orange, N. J., was struck by one of defendant's trains. The complaint alleges that the defendant was a Pennsylvania corporation and was the lessee of the Morris-Essex Railroad Company, a New Jersey corporation, on whose lines the accident occurred. The answer admits this allegation. (Court of Appeals original record from its library, Albany, N. Y.)

Scott v. *Pennsylvania R. R. Co.*, 130 N. Y. 679. Plaintiff resided at the time of the commencement of the action in New York City, and at the time of the accident at Rahway, N. J. He was struck by one of defendant's trains at Rahway, N. J. The complaint alleges the defendant was a Pennsylvania corporation and the lessee of the New Jersey Railroad and Transportation Company, a New Jersey corporation, on whose lines the accident occurred. The answer admits this allegation. (Court of Appeals original record from its library, Albany, N. Y.)

Huckenbottom v. *Delaware, Lackawanna & Western R. R. Co.*, 122 N. Y. 91. Plaintiff resided in New York City and was injured in Newark, N. J. Complaint alleges that defendant was a Pennsylvania corporation. This allegation is admitted by the answer. (Court of Appeals original record from its library, Albany, N. Y.)

Palmer v. *Pennsylvania R. R. Co.*, 111 N. Y. 488. In the original record at the Court of Appeals, the record on appeal from the judgment does not appear. In its place are papers on appeal from an order denying the motion to set aside the service of the summons and complaint.

The complaint alleges that the defendant was a Pennsylvania corporation and the lessee of the Pittsburgh, Fort Wayne and Chicago Railroad Company,

and that on December 14, 1882, the plaintiff purchased at the office of the defendant in the City of Chicago, Ill., a ticket from that city to Newburgh, N. Y., over the lines of the Pittsburgh, Fort Wayne and Chicago Railroad Company, to Mansfield, Ohio, and thence over other lines to Newburgh, N. Y.

Plaintiff took passage on one of defendant's trains from Chicago to Mansfield, and in attempting to alight at the latter station was thrown from the car platform.

The complaint does not allege the plaintiff's residence, but from the fact that he purchased his ticket to Newburgh, N. Y., and that he was represented by an attorney whose address was Newburgh, N. Y., it seems safe to presume that he was a resident of the State of New York. (Court of Appeals original record from its library, Albany, N. Y.)

In the year 1894, however, the Court of Appeals, for the first time, as far as we can find, wrote an opinion directly passing upon the question. (*Flynn* v. *Central Railroad Company of New Jersey*, 142 N. Y. 439.)

In the *Flynn* case, Flynn was a resident of New York, residing in the City of Brooklyn, and working in the State of New Jersey, where and when he was injured by the defendant, a New Jersey corporation. The lower Court held jurisdiction as matter of right upon the combined reasoning of two previous cases in the Court of Appeals. *Popfinger* v. *Yutte*, 102 N. Y. 38; and *Robinson* v. *Oceanic Steam Navigation Co.*, 112 N. Y. 351.) And the Court of Appeals said:

> "A preliminary point was taken at the trial and argued on this appeal challenging the jurisdiction of the Superior Court of the City of New York either of the defendant or the subject of the action. It is claimed that, as the plaintiff at the date of commencing the action was a resident of the city of Brooklyn, the defendant a

foreign corporation, and the cause of action one that accrued in New Jersey, the court under Section 263, Subdivision 7 of the Code of Civil Procedure had no jurisdiction. This section deals with the jurisdiction of superior city courts. Subdivision 7 extends it 'To an action by a resident of that city against a foreign corporation, either (1) to recover damages for the breach of a contract, express or implied, or the sum payable by the terms of a contract, express or implied, where the contract was made, executed or delivered within the state; or (2) where a warrant of attachment granted in the action has been actually levied within that city upon property of the corporation; or (3) where the summons is served by delivery of a copy thereof, within that city, to an officer of the corporation, as prescribed by law.'

It is sufficient answer to this objection that the jurisdiction of the Superior Court of the City of New York is defined by Article 6, Section 12 of the Constitution of this State, which reads in part as follows: 'The Superior Court of the City of New York' (and three other courts named) 'are continued with the powers and jurisdiction they now severally have, and such further civil and criminal jurisdiction as may be conferred by law.'

This article of the Constitution was ratified by the People in November, 1869, and took effect in 1870. At that time the Superior Court of the City of New York had jurisdiction in an action by a resident of this state for any any cause of action against a corporation created by or under the laws of any other state, government or country. (Code of Procedure, Sec. 427.) Any legislation limiting this jurisdiction is unconstitutional.

The court in *Popfinger* v. *Yuille* (102 N. Y. 38) held Subdivision 5 of Section 263 of the Code of Civil Procedure unconstitutional as being in conflict with the provision of the Constitution

> already cited. We hold the Superior Court of the City of New York had jurisdiction of this action. We now come to the consideration of this appeal on the merits."

The Superior Court of the City of New York was abolished by the Constitution of New York of 1894, (article 6, section 5), and the Judges of said court were made Justices of the Supreme Court, and all of the jurisdiction of said Superior Court was given to the Supreme Court.

Thus the law has remained to the present day, never seriously questioned by anybody,—*Gregonis* v. *Philadelphia & Reading Coal & Iron Co.*, (235 N. Y. 152) where the Court said, through Crane, *J.*:

> "The Appellate Division dismissed the complaint. As there was evidence sufficient to create a question of fact as to residence, the Appellate Division might have reversed upon the weight of evidence and granted a new trial but could not dismiss the complaint (*Woicianowicz* v. *P. & R. Coal & Iron Co.*, 232 N. Y. 256). It went further, however, and assumed that if the plaintiff were a resident of the State of New York the Supreme Court had the discretion and the power to dismiss the complaint because the tort happened in Pennsylvania and was governed somewhat by the Statutes of that State. The question is, therefore, squarely presented to us, whether or not the Supreme Court has any such power over an action brought by a resident of the State of New York. * * * As to a resident, however, a different question arises and a different law is applicable. Can the Supreme Court refuse to hear a case against a foreign corporation brought by one resident of this State, where the tort occurred outside the State, and entertain jurisdiction for another resident upon the same state of facts? If it has discretion to refuse jurisdiction in the one instance, it must have a like

> discretion to entertain it in the other. Discretion implies the power to make a choice. We do not think that as to a resident of this State the Court has any such discretion."

The statement of the law thus expounded by the learned Judge was therefore not dicta, but an authoritative restatement of the law of New York, as it had existed since the creation of the Supreme Court in 1691 (1 Col. Laws, pp. 226-229, 303-306, 358, 380; 2 id. 462, 639, 948; 3 id. 546, 780, 1007; 4 id. 1088, 5 id. 73).

The Act of May 6, 1691, of the Legislature of the Colony of New York, as far as applicable to the present question, read as follows:

> "That there shall be held and kept a Supreame Court of Judicature, which shall be Duely & Constantly kept att the Citty of New Yorke and not Elsewhere, att the severall & Respective times hereafter mentioned. And that there be five Justices at Least appointed & Commissionated to hold the same court, two whereof together with one Chief Justice to be a Quorum. Which Supreame Court are hereby fully Impowered and Authorized to have Cognizance of all pleas, Civill Criminall, and Mixt, as fully and amply to all Intents & purposes whatsoever, as the courts of Kings Bench, Comon Pleas, & Exchequer within their Majestyes Kingdome of England, have or ought to have * * *."

As was later said, "This Act founded the Supreme Court. * * * Not only did this act erect the tribunal which still continues the great law court of the state, but it vested in it a jurisdiction which change of government and constant reforms and revolutions in procedure have been powerless to abridge in any material respect, for while its jurisdiction has been enlarged by its union with the Court of Chancery, its ancient jurisdiction still remains unimpaired. The Supreme Court

of the Province was the instrument by which the great body of jurisprudence of the English common law was applied to New York." (*In re Steinway*, 159 N. Y. 250).

To supplement this inherent jurisdiction protected by the New York State Constitution of 1894 (Article 6, Section 1) as previously protected by Constitutions of 1821, Art. 5, sec. 4; 1846, Art. 6, sec. 3; Judiciary Article of 1869, Art. 6, sec. 6, amended 1879 and 1888, we have Section 46 of the General Corporation Law of New York, reading as follows:

> "Action against foreign corporation. * * * An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action."

Any statute of this State attempting to limit the jurisdiction of the Supreme Court, as to a citizen's or resident's fundamental right to resort to his superior court of original jurisdiction (New York Supreme Court) would violate the present New York State Constitution of 1894. (*Gregonis* v. *Philadelphia Coal & Iron Co., supra; People* v. *Luce*, 204 N. Y. 478; *People* v. *Nichols*, 79 N. Y. 582; *DeHart* v. *Hatch*, 3 Hun. 375).

The refusal, therefore, to take jurisdiction as matter of right of a similar action brought by a citizen of the United States, a citizen and resident of a sister state (Connecticut) in the Supreme Court of the State of New York is discriminatory and such refusal violates the plain intent of Article 4, Section 2, of the Federal Constitution.

Such refusal to entertain jurisdiction as matter of right in the case as bar is nothing short of unconstitutional discrimination under a guise.

At common law a non-resident of New York could maintain an action in tort against a foreign corpora-

tion in the New York Supreme Court regardless of where the cause of action arose if service of process could be obtained in the State of New York. (*McCormack* v. *Pennsylvania RR. Co.*, 49 N. Y. 303; 1 Colonial Statutes of New York, pp. 226, 229).

Between 1876 and 1913 an attempt was made to change the common law by a statute limiting the New York Supreme Court's jurisdiction as matter of right. (*Code of Civil Procedure*, section 1780; *Robinson* v. *Oceanic Steam Navigation Co.*, 112 N. Y. 315; *Hoes* v. *N. Y. N. H. & H. R. R. Co.*, 173 N. Y. 435; *Pietraroia* v. *N. J. & H. R. R. & F. Co.*, 197 N. Y. 434).

Whether such statute was a constitutional limitation on the New York Supreme Court's jurisdiction as matter of right where a foreign corporation was actually doing business in the state is a serious constitutional question in view of Article 1, Section 6, of the New York State Constitution of 1894 and Article 4, section 2 of the United States Constitution, but the question is immaterial in the instant case.

Since, by Chapter 60 of the New York Laws of 1913, section 1780 of the Code of Civil Procedure was amended by adding subdivision 4 to read as follows:

> "An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases *only*: (Italics ours) * * *
>
> "4. Where a foreign corporation is doing business within the State."

The use of the word *only* is very important as it is claimed to have changed the rule of *McCormack* v. *Pennsylvania R. R. Co.*, *supra*. Evidently, meaning that the Supreme Court has jurisdiction *only* in the four classes of cases specifically mentioned. (*Robinson* v. *Oceanic Steam Navigation Co.*, *supra*.)

By Chapter 916 of the New York Laws of 1920 section 1780 of the Code of Civil Procedure was re-enacted, unchanged, and became section 47 of the General Corporation Law of New York, where we now find it.

The Statute as it now reads is neither in conflict with natural justice nor the Federal Constitution. The difficulty is, that New York Courts have interpreted it to mean what the judges privately seem to believe the law should be, based on principles of state comity (*Murnan* v. *Wabash R. R. Co.*, 246 N. Y. 244), and not according to the intent of Article 6 of the Federal Constitution in view of Article 4, Section 2 of that instrument and the rights of residents of New York to resort to state courts.

It is this conflict that we ask this Court to overrule, since by the weight of authority the Supreme Court of the United States in the exercise of its appellate jurisdiction is not bound by the decision of a final state court establishing state law when that decision makes that which is constitutional unconstitutional within the plain intent of the Federal Constitution. (*Ward and Gow* v. *Krinsky*, 259 U. S. 503; *Fiske* v. *Kansas*, 274 U. S. 385; *Southwestern Tel., etc., Co.* v. *Danaher*, 238 U. S. 482; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S 292.)

Great stress has been placed by our courts on the words "may be maintained" as used in the section 47. They have been construed to vest a discretion in the court to entertain or decline an action. The same words, however, are used in section 46 of the same statute enacted at the same time, and as to their use in the latter section they have always been held mandatory. (*Gregonis* v. *Philadelphia & Reading Coal & Iron Co.*, *supra*.)

By what legal principle, we ask, do the same words command obligatory jurisdiction as matter of right in the case of a resident and give discretionary jurisdiction in the case of a non-resident in the same kind of an action in tort?

The principle of comity, perhaps, justifies certain classes of discrimination. But this principle has no application to the present action under our constitutional form of government, (*Murray* v. *Chicago & N. W. R. R. Co.*, 62 Fed. Rep. 24) since the present action involves the enforcement of the Federal Constitution and an act of Congress and not the applicability of a statute of a sister state.

This Court has dealt with the use of the word "residents" in *LaTourette* v. *McMaster*, 248 U. S. 465, and at page 470 said:

> "But our conclusion is not rested upon the mere use of the word 'residents'; for no doubt it might appear from the purpose and scope of the act that 'residents' was used in the sense of 'citizens'. If so, the Court would so construe it; and in no event would the Court sanction an evasion of the purpose and intent of this wise and wholesome provision of the Constitution based on mere verbiage."

What else does the New York ruling amount to but a guise "based on mere verbiage" to defeat the purpose of the Second section of Article 4 of the Federal Constitution.

The old cry of "State Rights versus Federal Authority" is apparent when our courts go so far as to hold that because state courts are organized and maintained by the citizens of the state and supported by state funds, they are some kind of a separate judicial system, whereas the very nature of our government, "an indestructible nation composed of indestructible

states'' requires that Federal and state courts compose one harmonious judicial system and not distinct systems like the courts of sister states bear to each other. (*Taylor* v. *Carryl*, 20 How. 595; *Covell* v. *Heyman*, 111 U. S. 182; *Claflin* v. *Houseman*, 93 U. S. 139.)

If New York allows its 'residents' the absolute right to resort to its courts, it must also allow its 'citizens' the same privilege for 'residents' must of necessity, under our constitutional form of government at least include 'citizens'. (Section 1, 14th amendment, U. S. Constitution.) To refuse a like absolute right to non-residents, when the non-resident is a citizen of the United States, of necessity must violate Section 2 of the 4th Article of the United States Constitution. (*Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142; *Missouri Pacific R. R. Co.*, v. *Clarendon Boat Oar Co.*, 247 U. S. 533; *Cole* v. *Cunningham*, 133 U. S. 107; *State ex rel. Watkins* v. *North American Lumber and Timber Co.*, 106 Louisiana 621; and *State ex rel. Prall* v. *District Court*, 126 Minn. 501.)

The discrimination in the case at bar is especially dangerous because it denies a fundamental right to a citizen of a free government to resort to one of his courts, (*Corfrila* v. *Coryell*, 4 W. C. C. 380) except for some special extenuating circumstances. (*Murnan* v. *Wabash R. R. Co.*, 246 N. Y. 244.)

True, the legislatures of the several states may, so to speak, burden a non-resident's right to resort to courts of the particular state; such as applying a short statute of limitations; requiring security for costs; providing for attachment and similar protective measures. To do this is not depriving him of his day in Court. It is simply compelling prompt attention to one's rights and extending protection to the defendant in the jurisdiction in which he is compelled to answer the alleged complaint.

Respondent cited in its original brief numerous cases of alleged discrimination against non-residents. The most important of which are: *Walton* v. *Pryor*, 276 Ill. 563, 245 U. S. 675; *Loftus* v. *Pennsylvania R. Co.*, 107 Ohio St. 352, 266 U. S. 639; *Chambers* v. *Baltimore & O. R. R. Co.*, 207 U. S. 142; *Missouri Pac. R. R. Co.* v. *Clarendon Co.*, 257 U. S. 533.

In our main brief we distinguished between these authorities and the case at bar. In each instance, some fact was present which deprived the Court of one of the essential elements of "ordinary jurisdiction, as prescribed by local laws, appropriate to the occasion, and invoked in conformity with the local laws." Either a citizen or resident as the case may have been could not invoke the court's protection in the given case, or, the court had no jurisdiction of the parties or subject matter under the given circumstances.

But, in the instant case none of these disqualifying elements are present, the Court has complete jurisdiction of the subject matter and the parties litigant, so these cases cited by respondent really turn out to be authorities or dicta in support of petitioner's contention.

The conclusion is inevitable that the Supreme Court of New York has appropriate jurisdiction to try and adjudicate the instant case (*Murnan* v. *Wabash, supra*), therefore, to deny that jurisdiction as matter of right to a citizen of the United States, a citizen and resident of Connecticut, is a true violation of the Federal Constitution.

Of course, we realize that this very important provision of our Federal Constitution has never been directly construed by this Court, but each and every decision, where dicta statements have appeared, leads to no other answer than that we have heretofore contended. (*Cole* v. *Cunningham*, 133 U. S. 107; *Chambers* v. *Bal-*

timore & Ohio R. R. Co., 207 U. S. 142; *Missouri & Pacific R. R. Co.* v. *Clarendon Boat Oar Co.*, 257 U. S. 533; *Ward* v. *Maryland*, 12 Wallace 430.)

There are, however, two direct state court interruptions in *State ex rel. Watkins* v. *North American Land & Timber Co.*, 106 Louisiana 621, and *State ex rel. Prall* v. *District Court of Wasecа County*, 126 Minn. 501. Both decisions hold that a citizen of a sister state is entitled to maintain an action in tort in either Louisiana or Minnesota where the tort occurred outside the State to the same extent, no more and no less, as a citizen of either of the respective states.

Further argument is futile. The New York Courts are in error, and the error must be remedied. The Federal Government must either assert its authority or surrender and acknowledge that the doctrine of comity applies to its relations with the several states.

Having disposed of the main question of the effect of Section 2 of Article 4 of the United States Constitution as applicable to the facts in the case at bar, there remains but a few important though really collateral matters to be disposed of.

(a) The power of the Congress over interstate commerce.

(b) The power of the Legislature of the State of New York to change the general law of the State, and whether or not such changes impose a burden upon interstate commerce or violate the obligation of an alleged contract between the State of New York and the New York, New Haven and Hartford Railroad Company.

(a) In dealing with the first of these issues there seems to be no dispute but that the Federal Congress

has the sole and exclusive power to legislate in regard to interstate commerce. (Article 1, Section 8, United States Constitution; *Minnesota Rate Cases*, 230 U. S. 852; *Dayton-Goose Creek R. R. Co. v. United States*, 263 U. S. 456; *2nd Employer's Liability Cases*, 223 U. S. 1.)

The only exceptions are: (1) If the Congress has made no express regulations with regard to foreign or interstate commerce, its inaction is equivalent to a declaration that it shall be free (*Welton v. Missouri*, 99 U. S. 275; *Brown v. Houston*, 114 U. S. 622) and (2) The power is not so far exclusive as to preclude state legislation on matters either local in their nature or operation, or intended to be mere aids to commerce, for which special regulations can be more effectually provided. (*Cooley v. Board of Wardens*, 12 Howard 299; *Henderson v. New York*, 92 U. S. 259; *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23).

The Congress, well aware of its powers over interstate commerce (see House Report of February 22, 1910, and Senate Report of March 22, 1910, to accompany H. R. 17263, Appendix A of our main brief) made provision that an action, such as the one in the case at bar, might be maintained in the district in which the accident occurred, or in which the defendant resides, or THE DISTRICT IN WHICH THE DEFENDANT IS DOING BUSINESS (U. S. Compiled Stat., Sec. 8662; Chap. 149, Sec. 6, April 22, 1908, 35 Stat. 66, amended April 5, 1910, Chap. 143, Sec. 1, 36 Stat. 291) whichever venue was selected by the injured workman or his widow or orphans.

Congress well knew that any pretense of hardship upon a great railroad corporation in defending such an action in a district in which it was actually doing busi-

ness, no matter how far from the residence of the corporation, is disingenuous.

No matter what else may be said about the amendment of section 6 of the Federal Employer's Liability Act of 1910 it certainly placed a burden upon interestate commerce, which was solely within the power of Congress, and which deprived a defendant railroad company of the benefits of removal to a federal court where a diversity of citizenship and the required amount are involved in the litigation pursuant to section 71 of the Judicial Code.

Not only did Congress make such provisions apply to actions when instituted in the United States District Court, but it expressly made the jurisdiction of the state courts concurrent with that of the federal courts and allowed the burden upon interstate commerce to remain when the action was instituted in the state court.

The debates in Congress when the Federal Employer's Liability Act was under consideration clearly shows that Congress deliberately intended to allow the injured employee or his widow and children to bring suit in a State where the defendant would not be powerful and influential, and that is why the Statute specifically provided that he might sue in the district (1) where the accident happened; (2) where the defendant resides; or (3) in the district where the defendant is doing business.

Congressional Record, Vol. 45, Part 4, 61st Congress, 2nd Session, page 4034.

> "The corporation being an inhabitant of the State which creates it, it might follow that the plaintiff would have to travel a long distance in order under certain conditions to bring his action. If this bill should be passed the law will be remedied in that respect enabling the plain-

tiff to bring his action where the cause of action arose *or where the defendant may be doing business.*"

"*The bill enables the plaintiff to find the corporation at any point or place or State where it is actually carrying on business and there lodge his action if he chooses to do so.*"

Vol. 45, Part 3, page 2255.

"It (meaning the bill) makes it much more convenient for the plaintiff to bring his suit by providing that he may sue in his own district or defendant's district or where the injury occurred *or where the defendant may be found.*"

"And it gives the state courts the right to administer the law."

It is the duty of the Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance. *Church of Holy Trinity* v. *U. S.*, 143 U. S. 457; *Ozawa* v. *U. S.*, 260 U. S. 178.

Congress thus emphasized its intent to provide that an injured employee of a common carrier railroad might sue under this act either in the District Court of the United States, or in any state court of competent jurisdiction in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of the commencement of the action. No doubt, Congress had the right to confer this jurisdiction upon the state courts, and the provisions of the Congressional Act are supreme. (*Matter of Taylor*, 232 U. S. 263; *Toledo, St. Louis and Western R. R. Co.* v. *Allen*, 72 L. Ed. 267; *Mondou* v. *N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1; *Missouri et al* v. *Taylor*, 266 U. S. 200). In fact and in law the state courts already had juris-

diction and the only way such jurisdiction could be limited was for Congress to expressly do so.

That Congress, when legislating regulating interstate commerce, may compel the several state courts to take jurisdiction of *civil* actions authorized by such legislation, whenever said "state courts ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws," is too well settled to dispute. (Cases *supra*, U. S. Constitution, Article 1, section 8, and Article 6, *Robb* v. *Conley*, 111 U. S. 637; *Tennessee* v. *Davis*, 100 U. S. 257; *Taylor* v. *Carryl*, 20 How. 595; *Covell* v. *Heyman*, 111 U. S. 182; *Teal* v. *Fulton*, 63 U. S. 292; *Defiance Water Co.* v. *Defiance*, 191 U. S. 194).

The instant case deals only with the powers of Congress relating to civil actions and not federal penal laws, which undoubtedly because of their penal nature can not be made enforceable in state courts by Congress as matter of right, since they are controlled by a fundamentally different rule. (Late Prohibition Cases.)

However, take the civil rule. Congress has sole power to legislate regulating interstate commerce, and pursuant to that power gave an injured railroad employee a cause of action against his master when both were engaged in an interstate commerce movement. The action sounds in tort, the amount of recovery is unlimited, special provisions covering safety appliances were put in the so-called Safety Appliance Act, contributory negligence was made a matter of diminution of damages only, the negligence of fellow-servants was wiped out, questions of assumption of risk were changed and deprived of the severity of common law interpretation. Most of these provisions are in conflict with the well-established principles of New York Law applicable to tort actions, but, nevertheless, our courts have correctly held that the provisions of a federal act

exclusively control when the action is instituted in the New York Supreme Court. (*Ward* v. *Erie R. R. Co.*, 230 N. Y. 230; *Cott* v. *Erie R. R. Co.*, 231 N. Y. 67; *Pless* v. *N. Y. Central R. R. Co.*, 232 N. Y. 522). And our Supreme Court is trying such cases almost every day when brought by a resident as matter of right and when brought by a non-resident as matter of discretion. (*Murnan* v. *Wabash R. R., Co.*, 246 N. Y. 244).

So the Supreme Court of the State of New York, by its "ordinary jurisdiction as prescribed by local laws is appropriate to the occasion." (*Missouri* v. *Taylor*, 266 U. S. 200.)

We do not contend that Congress can create jurisdiction in a state court or compel a state to organize and maintain a court with the necessary jurisdiction to try these actions. The court must exist and have jurisdiction. If the court exists and has jurisdiction, Congress may enforce the exercise of its jurisdiction. (Article 6 and Article 1, Section 8, U. S. Constitution.)

To illustrate: The County Courts of the State of New York have jurisdiction only to the extent of $3,000, where the defendant is a resident of the County and a natural person or domestic corporation, but in no case may a foreign corporation be sued in said courts, whether or not it is doing business within the State of New York, or the County in which the action is sought to be maintained. (Article 6, Section 14, N. Y. Constitution, 1894; N. Y. Civil Practice Act, Sec. 67; *Wachtel* v. *Diamond Corp.*, 215 App. Div. 15; etc.). The Congress could not compel such courts to take jurisdiction of this action.

The same general principle applies to City Courts and Municipal Courts which are all courts of confessedly limited jurisdiction whereas the Supreme Court of New York is a court of general jurisdiction.

Our Supreme Court is a court of general jurisdiction, in law and equity, derived from its original crea-

tive act of 1691 and the consolidation or merger of the Courts of Chancery and the several Superior Courts of the various cities of the State of New York, all of which were abolished by various Constitutions of the State of New York, and all of whose jurisdiction was merged into the New York Supreme Court, and which latter Court, by the present Constitution of 1894, cannot have its jurisdiction limited in any way except by the adoption of a new Constitution. (N. Y. Constitution, Article 6, Section 1.)

Therefore, for Congress to enact a statute specifically conferring upon the New York Supreme Court concurrent jurisdiction (a jurisdiction it already possessed until limited by Congress) with the federal courts in an action brought pursuant to said statute is simply compelling the New York Supreme Court and the Judges of said Court to honor their oaths and obey Article 6 of the United States Constitution and adjudicate the rights of the parties under the rules and provisions of the federal act in an ordinary tort action similar to any other tort action triable in said court, except insofar as the federal act changes the rules and provisions of the common law and the statutes of New York, which would otherwise be applicable to such an action if it were not for the fact that different rules have been prescribed by the Federal Congress. The mere fact that different rules have been prescribed is immaterial. (*Mondou* v. *N. Y. N. H. & H. R. R. Co.*, 223 U. S. 1.) It is a court's duty to adjudicate the rights of parties litigant in any action over which it has jurisdiction of the subject matter and of the parties.

There should be no question but that Congress may burden interstate commerce so long as the burden is uniform and does not violate the Seventh Amendment of the Federal Constitution. The present act applies

to all common carrier railroads with the same force and effect and has been held to deprive none of any Constitutional right. (Second Federal Employer's Liability Cases, 223 U. S. 1.)

Exclusive power to legislate over a given subject carries with it the incidental power to burden and regulate, such as to enact uniform legislation covering all actions given by said act. In the instant case the two most important of which are the extension to the plaintiff of three venues in which to bring his action and the prohibition of removal of such action when brought in a state court from the state to the federal court, either as matter of right or as matter of discretion on the ground of a diversity of citizenship or for any other reason.

It seems to us that this latter burden upon interstate commerce is the burden which the respondent has and is attempting to charge to Subdivision 4 of Section 47 of the General Corporation Law of the State of New York, when it contends that because said subdivision authorizes an action in the New York Supreme Court where a foreign corporation is doing business within the State of New York, such authorization is a burden upon interstate commerce.

We ask with all sincerity how Subdivision 4 of Section 47 of the General Corporation Law of New York can possibly burden interstate commerce in the instant case when the Federal Congress has decreed that an action, such as the one in the case at bar, may be maintained as of right in the Southern District of New York, which district includes the Counties of New York, Bronx and Westchester, where the defendant is actually doing business, and where this action was instituted under the concurrent provisions of the Federal Act in a State Court sitting within said District and not

more than twenty-five miles away from the present site of the District Court for the Southern District of New York.

To carry the argument one step further, petitioner could have brought this action in the New York Supreme Court in New York County. If this had been done the Federal Court would have been located on one side of City Hall Park and the State Court on the other.

All the Legislature of New York did when it added Subdivision 4 to Section 47 of the General Corporation Law in 1913, as said law then existed in Section 1780 of the Code of Civil Procedure, was to amend the general law of the State of New York applicable alike to all foreign corporations, whether they be engaged in interstate commerce or not, or have agents designated to accept service of process in New York or not, and made said corporations answerable in our courts if service of process could be obtained upon them when they were actually doing business within the State of New York. No attempt was made to deprive any of said corporations of the right to defend in New York Courts or to prohibit removal of any action from the state court to the federal courts. (*Mahar* v. *Harrington Park Villa Sites*, 204 N. Y. 231). The legislature simply said that if a foreign corporation does business in New York, a suit against it may be maintained in the Courts of New York, and in these respects the New York Statute differs from all statutes heretofore adjudicated by this Court and held to create burdens upon interstate commerce.

(b) In dealing with the last question, the power of the Legislature to change general laws and whether or not such a change violates the obligation of an al-

leged contract, we will simply refer to some general and well-settled fundamental principles of law.

What constitutional right does a foreign corporation acquire by receiving permission to do business in a state other than its creation to successfully object to a change in the state's general laws? A citizen of the state has no constitutional guarantee that the general laws will remain unchanged (*Pennie* v. *Reis*, 132 U. S. 464; *People* v. *Coler*, 173 N. Y. 103), and a foreign corporation may be denied the privilege of doing business in a particular state. (*Hooper* v. *California*, 155 U. S. 648, and cases cited in said opinion.) At the best such permission is only a matter of comity between the several states. (*Connecticut Mutual Life Ins. Co.* v. *Spratley*, 172 U. S. 602; *Security Mutual Life Ins. Co.* v. *Prewitt*, 202 U. S. 246; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322). Such permission, by the weight of federal authority, is a revocable license or privilege subject to change. (Cases, *supra*.) True, the consent filed by the respondent was a contract, but such contract is subject to the construction placed thereon by the Court of Appeals (*Bagdon* v. *Phil. and Reading Coal and Iron Co.*, 217 N. Y. 432; *Penn. Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U. S. 93; *New York, L. E. & W. R. Co.* v. *Estell*, 147 U. S. 591; *The Eliza Lines*, 199 U. S. 119). A change in general laws does not violate the obligation of such contract where the change does not deprive the respondent of due process of law (*Hays* v. *Seattle*, 251 U. S. 233). An agent or officer designated for the purpose is here to accept service though the cause of action has no relation to the business transacted in the State of New York. (*Barrow S. S. Co.* v. *Kane*, 170 U. S. 100).

As far as the respondent's interstate commerce business is concerned, it could and now can conduct such business and maintain its agents in the State of New

York for the transaction of such interstate business (*Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282) without the necessity of having a designated agent within the State for the service of process. (*International Fuel & Ice Corp.* v. *Downer Steel Co.*, 242 N. Y. 224.) The service of process could be made upon the defendant by the use of a writ of attachment, and the mere fact that it now finds itself sued in the New York Supreme Court by a citizen of the State of its creation, under authority of a Federal Statute regulating interstate commerce, seems to us a poor excuse for attempting to attack a change in the general laws of the State of New York on the ground that the change violates the obligation of a contract, when the alleged contract was merely at best a revocable license and the change placed no burden upon interstate commerce that had already not been placed there by the Federal Congress.

The Federal Congress said that the action "may be maintained in the district in which the defendant is doing business." The State act says that the action may be maintained "where a foreign corporation is doing business within this state." And the respondent never has and never can successfully contend that it is not actually conducting business (interstate and intrastate) in the State of New York every day of the year. (*Penn. Collieries Co.* v. *McKeever*, 183 N. Y. 98; *Bank of America* v. *Whitney Central National Bank*, 261 U. S. 171).

In Conclusion.

It seems to the petitioner that for this Court to sustain the judgment below is but to extend the principles of a doctrine of state comity to the relation of the Federal Government in its dealings with the several

states; to deprive a citizen of a free government of one of his most sacred and fundamental rights, the right to resort to one of the courts of a harmonious judicial system as of right for an adjudication of whatever rights he may have; to place a strained judicial interpretation upon the words resident and non-resident as used in Sections 46 and 47 of the General Corporation Law of New York, and lastly for this Court to substitute its judicial discretion for the legislative wisdom and authority of the Federal Congress concerning a matter (interstate commerce) over which subject the Federal Congress has always been the acknowledged authority when it has sought to exercise its powers and such exercise has not violated the Federal Constitution.

Respectfully submitted,

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 312.

CHARLES L. DOUGLAS, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Petitioner's Reply Brief on Re-Argument in Support of Writ of Certiorari to the Supreme Court of the State of New York.

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Supreme Court of the United States

OCTOBER, 1928 TERM.

No. 312.

CHARLES L. DOUGLAS,
Petitioner,

AGAINST

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Petitioner's Reply Brief on Re-Argument in Support of Writ of Certiorari to the Supreme Court of the State of New York.

Petitioner asks permission to file this reply in answer to the combined briefs of the Attorney General of the State of New York, appearing *amicus curiae*, and the respondent.

The learned Attorney General and the learned counsel for the respondent have completely failed to understand petitioner's contentions.

We do *not* contend, and never have contended;

(1) That the Federal Employer's Liability Act increased the jurisdiction of the Supreme Court of the State of New York.

(2) That Congress could, or even attempted to, create jurisdiction in the Supreme Court of the State of New York to try an action brought pursuant to the Federal Employer's Liability Act.

(3) That "resident" and "citizen" are always or generally synonymous.

(4) That the State of New York cannot discriminate between resident and non-resident, *as such* in the use of its courts.

(5) That this court is not bound by a construction of the law of the State of New York made by the New York Court of Appeals if that construction does not violate the Constitution of the United States.

We, however, always have contended, and still most strenuously urge;

(1) That Section 6 of the Federal Employer's Liability Act, as amended in 1910, removed every doubt that it was the intention of Congress, that State Courts equally with Federal Courts try actions brought under the act when State Courts had appropriate jurisdiction.

(2) That Congress had absolute power to and did create "a Federal right enforcible in a State court whenever that court's ordinary jurisdiction, as prescribed by local laws, was appropriate to the occasion and was invoked in conformity with those laws."

(3) That "resident" as used in Section 46 of the General Corporation Law of the State of New York ("An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action") not only includes New York "citizens" but "alien residents" and "citi-

zens" of a sister state resident in New York for the time being.

(4) That a New York Citizen is always a legal resident of that state (even though having another residence in a sister state or even without a physical residence in New York) and thus under Section 46 of the New York General Corporation Law has an absolute unqualified right to sue a foreign corporation doing business in New York for a tort committed without the state, and, therefore, the Courts of New York cannot constitutionally discriminate against the citizen of a sister state and decline to entertain jurisdiction of his like cause of action.

POINT I.

Citizenship, under our form of constitutional government, necessarily implies and carries with it legal residence in the state of citizenship; therefore, a citizen of the United States and a citizen of the State of New York is always a resident of the State of New York, although he may temporarily, for business purposes or other personal reasons, reside in a sister state or foreign country.

Citizenship implies and carries with it legal residence within the State of citizenship.

Under Section I of the 14th amendment of the United States Constitution, as far as applicable to this case, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and citizens of the state wherein they are domiciled. The 14th amendment does not make a citizen of the United States a citizen of a state in which

he resides unless he intends with such residence therein to change his domicile or legal residence from the state of which he was last a citizen.

Sharon v. *Hill*, 26 Fed. 337, 344.

"No length of residence without the intention of remaining constitutes domicile." (*Pennifield* v. *Chesapeake*, 134 U. S. 351, 356.)

There is a difference between the terms domicile and residence in their ordinary meaning. (*Briggs* v. *Rochester*, 16 Gray 337; *Matter of Wrigley*, 8 Wend. 134; *Burrill* v. *Jewett*, 2 Rob. 701; *Bartlett* v. *The City of New York*, 5 Sandf. 44.) A man may have his domicile in one place and his actual residence in another. (*Frost* v. *Brisbin*, 19 Wend. 13; *Luscomb* v. *N. J. R. R. & T. Co.*, 6 Lans. 75; *Campbell* v. *Campbell*, 90 Hun. 233; *Eaves Costume Co.* v. *Pratt*, 2 Misc. 420.) One may be a resident of two places at one and the same time. To establish a residence requires a less permanent abode than to give a domicile or even to create an inhabitance. (*Bell* v. *Pierce*, 51 N. Y. 12; *Union Hotel Co.* v. *Tersee*, 79 N. Y. 455.) *It is equally well settled that absence is not equivalent to non-residence.* (*Hart* v. *Kip*, 148 N. Y. 306; *People* v. *Platt*, 117 N. Y. 160; *Taylor* v. *Norris*, 104 App. Div. 21.)

In the *Taylor* case the plaintiff was domiciled in the State of New York at the time of the commencement of the action, having a residence in Brooklyn, in the City of New York, although at the time of the commencement of the action she temporarily resided in the State of New Jersey, and when the defendant attempted to make her file security for costs as a non-resident the Court said:

"The doctrine of such cases insofar as they hold that absence from the state is the equivalent

> of non-residence has been overthrown. • • • Citing *Hart* v. *Kip, supra.*"

In the *Hart* case, *supra*, the defendant was domiciled in the State of New York and had been travelling for a number of years, and the Court said:

> "A person who has a residence and domicile in this state and departs as a traveller for business or pleasure in another country does not by his absence acquire a residence or reside in that country. He must while so absent at least take up his temporary abode at some particular place with the intention of making it his home while so absent and actually reside there. • • • Neither a residence or domicile is acquired by a mere visitor from this country travelling from place to place in Europe, all the time intending when the purpose of the journey is satisfied to return to his home here. • • • *The residence of a party is presumed to be where his domicile is* though he may be temporarily absent until some facts are shown to change the presumption, or to justify a finding that he has taken up another residence elsewhere."

The word resident as applied to our constitution and statutes ordinarily means an individual (citizen). (*Wachtel* v. *Diamond State Engineering Corp.*, 215 App. Div. 15; *People* v. *Schoonmaker*, 63 Barb. 44.)

In the *Matter of Newcomb*, 192 N. Y. 238, the Court said:

> "In order to acquire a new domicile there must be a union of residence and intention."

A man living in the domicile of origin does not effect a change of domicile merely by declarations or even intention. (*Schmell* v. *Schenck*, 40 Ind. App. 581; *Queen* v. *Neville*, 7 Calif. App. 231; *de Mille* v. *de Mille*,

120 N. Y. 485; *Bradley* v. *Davis*, 106 Calif. 267.) Furthermore, there must be present a definite and honest purpose to give up the old domicile. (*Matter of Newcomb, supra.*)

A person may have many residences but only one domicile, and, of course, his residence may be in one place and his domicile in another, and he may reside for many years in a home far distant from his domicile and without any physical continued residence in his place of domicile without losing his domicile residence in the state of citizenship. (*Matter of Newcomb, supra; Campbell* v. *Campbell, supra; Crauford* v. *Wilson*, 4 Barb. 404; *Matter of Martin*, 203 App. Div. 1; 219 N. Y. 357.)

Residence alone, however long continued, even for a number of years, will not affect a change of residence in the state of citizenship in the absence of a distinct intention to change the place of domicile. (*Matter of Newcomb, supra; Dupuy* v. *Wartz*, 53 N. Y. 557; *U. S. Trust Co.* v. *Hart*, 150 App. Div. 413; 208 N. Y. 617.)

Thus a residence in a foreign country for twenty-five years without physical residence in the state of domicile will not change the domicile without intention of settling permanently. (*Hudy* v. *Hudy*, 1 S. C. App. 441.)

Therefore, a citizen of the United States, who is also a citizen of the State of New York, is *always a legal resident* of the State of New York even though residing without the State until he changes his domicile, and can sue in its courts as of right, the same as physical residents of such State. Thus, this is a *right* which he has as a citizen of New York, and that State, must, under the Federal Constitution, grant a similar right to a citizen of a sister State.

POINT II.

A citizen always being a legal resident of the state of citizenship, he is one of the persons designated as a "resident" in Section 46 of the General Corporation Law of the State of New York who can sue a non-resident or foreign corporation for any cause of action. Therefore, a citizen of the United States who is a Connecticut citizen and therefore a legal resident of said state is a person of identical character as a citizen of New York and to deny to this Connecticut citizen a *right* to resort to the Courts of the State of New York under circumstances where a New York citizen may sue as of right is an unconstitutional discrimination within the meaning of Section 2 of Article 4 of the United States Constitution.

We have always contended that the right to resort to courts is a fundamental right of a citizen of a free government and have cited numerous cases to that effect in our previous briefs. In fact, the learned Attorney General of the State of New York at pages 16 and 17 of his brief admits that this is true.

In *Blake* v. *McClung*, 172 U. S. 239, at 256, the Court, by Harlan, *J.*, says:

> "We must not be misunderstood as saying that a citizen of one state is entitled to enjoy in another state every privilege that may be given in the latter to its own citizens. There are privileges that may be accorded by a state to its own people in which citizens of other states may not participate except in conformity with such reasonable regulations as may be established by the state. *For instance, a state cannot forbid citi-*

> *zens of other states from suing in its courts,* that right being enjoyed by its own people; but it may require a non-resident, although a citizen of another state, to give bond for costs, although such bond be not required by a resident. * * * The constitution forbids only such legislation affecting citizens of the respective states as will substantially or practically put a citizen of one state in a condition of alienage when he is within or when he removes to another state, *or when asserting in another state the rights that commonly appertain to those who are part of the political community known as the people of the United States and by and for whom the government of the Union was ordained and established*" (Italics ours).

This statement of the law by the late Mr. Justice Harlan is exactly what we have attempted to convey to this Court. The State of New York may require the petitioner to give security for costs, and this is not an unconstitutional discrimination; it does not deprive the petitioner of his day in court. (Plaintiff's main brief on re-argument, page 21.)

A state cannot give her citizens preference over citizens of other states in the assets of a foreign corporation doing business in the legislating state, even though the statute granting the preference uses the word "resident" rather than the word "citizen." (*Blake* v. *McClung*, 172 U. S. 239.)

And here the State of New York by using the word "resident" instead of the word "citizen" in section 46 of the General Corporation Law cannot deny a right to a citizen of a sister state which is enjoyed by its own citizens who are always legal residents of that state.

The statute as it now *reads* is neither in conflict with natural justice nor the Federal Constitution. The difficulty is, that the courts of New York and particularly

the Court of Appeals *have interpreted it to mean what the judges privately seem to believe the law should be*, based on principles of state comity, (*Murnan* v. *Wabash Ry. Co.*, 246 N. Y. 244), and not according to the intent of Article 6 of the Federal Constitution in view of Article 4, Section 2 of that instrument and the rights of residents of New York to resort to state courts.

It is this conflict that we ask this Court to overrule, since by the weight of authority the Supreme Court of the United States in the exercise of its appellate jurisdiction is not bound by the decision of a final state court establishing state law when that decision makes that which is constitutional, unconstitutional within the plain intent of the Federal Constitution. (*Ward and Gow* v. *Krinsky*, 259 U. S. 503; *Fiske* v. *Kansas*, 274 U. S. 385; *Southwestern Tel., etc. Co.* v. *Danaher*, 238 U. S. 482; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292.)

Grave doubt has always been expressed by trial judges and appellate court judges since the decisions of this Court in *Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142, and *Anglo-American Provision Co.* v. *Davis Provision Co.*, No. 1, 191 U. S. 373, as to the constitutionality of Section 1780 of the Code of Civil Procedure, now Sections 46 and 47 of the General Corporation Law of New York.

In *Johnson* v. *Victoria Chief Copper Mining & S. Co.*, 150 App. Div. 653, the Court said:

> "In *Robinson* v. *Oceanic Steam Navigation Company*, 112 N. Y. 315, this section was held not to violate the provision of the Constitution of the United States, for the reason that it made no discrimination between citizens of various states, but only between residents and non-residents. It is true that there are indications in the opinion in *Anglo-American Provision Co.* v. *Davis Pro-*

> *vision Co.*, No. 1, 191 U. S. 373 that there may have been doubts in the minds of that court as to the constitutionality of section 1780 insofar as it applies to *citizens*, as violative of the Second section of Article 4 of the Constitution of the United States, for the Court said: 'If the state does provide a court in which its own citizens may resort in a certain class of cases, it may be that citizens of other states of the Union also would have a right to resort to it in cases of the same class.'"

In *Fairclough* v. *Southern Pacific Co.*, 171 App. Div. 496; Clarke, *P. J.*, while concurring with the opinion of the court holding that the amendment in 1913 to section 1780 of the Code of Civil Procedure was not retroactive, said:

> "While I have very grave doubts whether section 1780 of the Code of Civil Procedure as it existed prior to the amendment of 1913 will ultimately be held to be constitutional by the Supreme Court of the United States, it has so been held by the Court of Appeals. I feel, therefore, constrained to concur with the opinion of Mr. Justice McLaughlin reversing the order appealed from."

In this same case the late Mr. Justice Scott (who, in our opinion, was one of the most thoroughly versed justices in Federal Constitutional questions New York State has ever had) said:

> "So far as concerns the validity, under the Federal Constitution, of Section 1780 of the Code of Civil Procedure as it stood before the amendment of 1913 (Laws of 1913, Chap. 60), inasmuch as it denies to a *citizen* of a foreign state a right of action enjoyed by the *citizens* of this state, I consider that there is very great doubt. Of course I am aware that its validity has been af-

> firmed by the Court of Appeals in *Robinson* v. *Steam Navigation Co.*, (112 N. Y. 315), which was followed by this Court in *Johnson* v. *Victoria Chief Copper & S. Co.*, (150 App. Div. 653). Since the above cited decision of the Court of Appeals the question seems to have been differently decided by the Supreme Court of the United States—the paramount authority upon questions affecting the construction and application of the Federal Constitution (*Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142; *International Text Book Co.* v. *Pigg*, 217 id. 91, 112). Since it is universally conceded that upon such questions the authority of the United States Supreme Court is controlling (*People ex rel. Central Park, etc. R. R. Co.* v. *Willcox*, 194 N. Y. 383; *Sibiley* v. *Sibiley*, 76 App. Div. 132) it seems that the *Robinson* case, *supra*, and those cases in this state which have followed it must be deemed to have been *overruled*."

When the *Fairclough* case, *supra*, was decided at Special Term by Mr. Justice Lehman, now of the Court of Appeals, he said:

> "The plaintiff, however, urges that since that time (decision of *Robinson* v. *Oceanic Steam Navigation Co.*, 112 N. Y. 315) the Supreme Court of the United States has placed its interpretation upon similar statutes of other states and has held them unconstitutional (see especially *Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142; also *Anglo-American Provision Co.* v. *Davis Provision Co. No.* 1, 191 U. S. 373). These cases raise serious doubt as to whether the Supreme Court would not hold our statute unconstitutional if the question was directly presented to it, yet until the Supreme Court has definitely passed upon this question the decisions of the appellate courts of this state are binding."

The same view was taken by Mr. Justice Mills in the Appellate Division in *Waiskoski* v. *Philadelphia &*

Reading Coal & Iron Co., 178 App. Div. 932, in his dissenting opinion.

All of these learned judges have evidently had in mind that a citizen of the State of New York is always able to resort to his courts as of right for any cause of action.

Great stress has been placed by our courts upon the words "may be maintained" as used in Section 47. They have been construed to vest a discretion in the Court to entertain or decline an action. The same words, however, are used in Section 46 of the same statute enacted at the same time, and as to their use in the latter section they have always been held mandatory. (*Gregonis* v. *Philadelphia Coal & Iron Co.*, 235 N. Y. 152.)

We believe that the correct interpretation of these words instead of granting discretion to the court is that they grant discretion to a prospective plaintiff as to whether or not he will resort to New York State courts because the statute not only says the action may be maintained but it says may be maintained *only* in one of four classes of cases, and, therefore, the specification of the classes of cases after the word *only* deprives the court of all discretion. This view was entertained by Mills, *J.*, in *Wasikoski* v. *Philadelphia & Reading Coal & Iron Co.*, 178 App. Div. 932, where he dissented as follows:

> "Dissented upon the ground that jurisdiction is absolutely imposed upon the court under Section 1780 of the Code of Civil Procedure, and, therefore, the court had no discretion to decline to exercise it."

Judge Mills' view must be correct. By what legal principle do the same words command obligatory jurisdiction as matter of right in Section 46 and give dis-

cretionary jurisdiction in Section 47 in the same kind of a tort action.

When the State of New York grants its own citizens who necessarily have their legal residence in the State of New York, the right to resort to its courts as of right, *even though under the term resident*, and at the same time denies a similar right to a citizen of the United States and a citizen of a sister state, who has his legal residence in the state of his citizenship, it is discriminating between citizens of the several states under the guise of discrimination between resident and non-resident within the plain intent and meaning of Section 2 of Article 4 of the United States Constitution.

POINT III.

The decisions cited by the Attorney General and the respondent are not decisive of the question herein involved.

The learned Attorney General relies on *Frost and Dickenson* v. *Brisbin*, 19 Wend. 13, and quotes a portion of a paragraph on page 15 of the opinion, but he leaves out the most important part of the paragraph, as follows:

> "The idea of the statute was to limit the privilege to debtors living permanently in the state for the time being, which it was presumed would generally bring their property within the reach of execution; or enable the creditor to apply any other coercive measure in the collection of his debt, which the laws have provided. All our construction of the statute exacts in respect to citizens of other states and territories is that they shall put themselves on a footing with our own citizens, and then they are entitled to the like immunities. Surely this clause of the construc-

> tion enjoins nothing further. *The argument goes the unreasonable length of claiming for citizens of other states privileges surpassing our own*" (Italics ours).

Both the Attorney General and the respondent cite the case of *Adams* v. *Penn Bank of Pittsburg*, 35 Hun. 393, and they utterly fail to realize, that this action was instituted *before Subdivision* 4 of Section 1780 of the Code of Civil Procedure, authorizing the maintenance of any action by a foreign corporation, or non-resident "where a foreign corporation is doing business within this state" *was added* to the Code of Civil Procedure.

Besides this failure to realize that the addition of subdivision 4 in and of itself made a substantial difference in the condition of the law, they also fail to realize that the learned judge who wrote the opinion predicates it upon an *impossible premise*: that a person who continues to be a New York State citizen can be legally a non-resident thereof, even though he has a physical residence in the State of Pennsylvania. For all that appears in this opinion the plaintiff may never have been a citizen of the State of New York, and may never have been a citizen of the United States. And the learned Judge's statement "the plaintiff being a resident may be presumed to be a citizen of the State of Pennsylvania" is *utterly in conflict* with the decisions of this Court in *Robertson* v. *Cease*, 97 U. S. 646; *Everhart* v. *Huntsvillle College*, 120 U. S. 223; *Menard* v. *Goggan*, 121 U. S. 253, and is shown to be unsound by the other cases and argument that the learned Attorney General advances at pages 28 and 29 of his brief.

At the best Adams was a non-resident in every true sense of the word and he failed to prove himself a citizen of the United States or a citizen of the

State of Pennsylvania. Furthermore, this *Adams* case was never appealed to the New York Court of Appeals.

The respondent also cites the case of *Duquesne Club of Pittsburg* v. *Penn Bank of Pittsburg*, 35 Hun. 390. This decision may be disposed of by mere reference to the fact that the plaintiff was a corporation. The same judge who wrote the opinion in the *Adams* case wrote this opinion, and again we find a failure to realize that a citizen is always a legal resident of the State of his citizenship. Also this *Duquesne* case was never appealed to the Court of Appeals.

The opinion in the *Adams* case, 35 Hun. 393, is not the law of New York State, and is not binding upon the United States Supreme Court for the reasons:

(1) That the part relied upon by the defendant is obiter;

(2) It is not a decision or opinion by our Court of Appeals—the case was never appealed to the Court of Appeals;

(3) It is contrary to Section 1 of the 14th Amendment of the United States Constitution and Section 1 of Article 1 of the State Constitution;

(4) It is contrary to the declared policy of the State of New York, as set forth in the opinion of the Court of Appeals of the State of New York in the latest case on the subject, *Gregonis* v. *Philadelphia & Reading Coal & Iron Co.*, 235 N. Y. 152, in which the Court, referring to the New York Supreme Court, states:

> "When the Supreme Court says to one resident plaintiff 'We will not hear your case against a Pennsylvania corporation for a tort committed within that state' and has power to say to an-

other resident 'We will hear your case on like facts' *it comes very near a violation of these constitutional provisions.*" (Referring to Section 1, 14th Amendment, United States Constitution, and Section 1, Article 1 of the New York State Constitution.) (Italics are petitioner's.)

(5) The New York Court of Appeals has never held that a citizen of New York, or, to use the language of its constitution, "a member of the State," who may be physically a non-resident, and not an inhabitant but retaining his citizenship, may not sue as of right in the New York Courts, for any cause of action upon which a citizen and physical resident may sue; *and as a matter of fact the Court of Appeals has* always held that its citizen, even though without the State and not an inhabitant of New York, can sue as of right a foreign corporation upon any cause of action wherever it arises. (See decisions cited on pages 10-15 of this petitioner's brief in this Court on re-argument; also *Taylor* and *Hart* cases, *supra*, pages 4-5 of this reply brief; and particularly the *Flynn* case, 142 N. Y. 439; see page 13 this petitioner's brief on re-argument.)

The Court of Appeals of the State of New York has never construed its statutes (as to the rights of citizens, or citizens-residents, or non-residents to sue), as permitting a citizen who is physically a resident to sue under circumstances *when* they do not allow the same unqualified right to its citizen who is not a physical inhabitant or resident to sue.

It could not do so, because this is prohibited by Section 1 of the 14th Amendment and Section 1 of Article 1 of the New York State Constitution.

On the contrary, the only decision, *Gregonis* v. *Philadelphia & Reading Coal & Iron Co.*, *supra*, by the Court of Appeals on this subject, (which, however, does not pass upon the precise point, but which in the *opin-*

ion is declarative of the State's policy upon the subject), is to the absolute contrary. Crane, *J.*, in that opinion, states that if, and when "the New York Supreme Court says to one resident-plaintiff 'We will not hear your case against a Pennsylvania corporation for a tort committed within that State' and has the power to say to another resident 'We will hear your case on like facts' *it comes very near to a violation of these constitutional provisions.*" (Referring to Section 1 of the 14th Amendment of the United States Constitution, and Section 1 of Article 1 of New York State Constitution.)

Section 1 of the 14th Amendment of the Constitution of the United States provides:

> "* * * Nor shall any state deprive any person of life, liberty or property without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*"

A citizen of a state is necessarily a legal resident of the state of citizenship. Under this provision of the Constitution he is entitled at least to the equal protection of the laws granted to *any* citizen of that state. Therefore, a state cannot grant its citizen, who is physically a resident, the absolute right to sue in its courts, and deny a similar right under the same circumstances to its citizen, who may not be then an actual-inhabitant or physical-resident thereof, because to do so would not be to give him the equal protection of the laws.

The language of the 14th Amendment, Section 1, which says "nor deny to any person *within its jurisdiction* the equal protection of the laws" is very important. A citizen of a State, whether physically a resident, or not, is always within the *jurisdiction* of the State, of which he is a citizen. Even when he is physically a resident thereof, but maintains his citizenship

and domicile therein *he is subject to its jurisdiction.* All *personal* property owned by him, wherever located, may ordinarily be assessed and taxed by the State of which he is a citizen. The State of his citizenship may levy a tax upon his income even though earned in other States. It may levy an inheritance tax upon the property of which he dies possessed, whether he is a physical resident, or not, of the state of his citizenship,—no matter where such property is situated. Primarily he is more within the jurisdiction than a non-citizen-resident or alien-resident.

Section 1 of Article 1 of the Constitution of the State of New York reads as follows:

> "No member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to *any* citizen thereof, unless by the law of the land, or the judgment of his peers."

This language "a member of the State" is very important and significant. It must mean that a citizen is a member of the State more than any other person therein; and consequently a citizen has an absolute right to sue in the courts of this State. This section of the State Constitution makes it constitutionally impossible for the State to allow *any* of its "members"—its citizens—to sue in its courts as a matter of right without granting similar rights to all of its "members" or citizens wherever physically residing. It would thus prevent the legislature from saying, *and the legislature has not said*, that its citizens, who are physically residents, can sue as a matter of right, under given circumstances, and that its citizens, who are not physically residents, cannot sue under the same circumstances.

It follows, therefore, that under the Laws and Constitution of the State of New York a citizen of New

York, whether physically a resident therein, or not, can sue a foreign corporation doing business in New York State for any cause of action arising anywhere; and consequently a citizen of a sister State can do the same. Any statutes or decisions of the courts of New York which may possibly be claimed to deny the citizens of sister States an equal right and privilege are in controvention of Section 2 of Article 4 of the United States Constitution, which provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. However, there are no such statutes or decisions.

The plaintiff emphatically contends that a man cannot be a citizen of the state unless he is a legal resident thereof, whether he lives elsewhere part of the time or not. The word resident in the New York statute was more likely used to give to a resident a right to sue even though not a citizen; but, in any event, it is both narrow and unsound to hold that a person may be a citizen without being a legal resident. Moreover no court has ever so held. In the *Adams* case there is some unsound obiter; but the case being decided was an action brought in this state by a resident of a foreign state not shown to be a citizen of this State; and the defendant was not doing busines in this state—which last situation is the exact contrary to the admitted fact in the instant case.

Furthermore it is contrary to all elementary principles of government, and contrary to reason to assume or to hold that the legislature intended to confer an absolute right to sue upon a resident, whether he was a citizen or not, and intended to deny such absolute right to any citizen, no matter how situated or located.

No other cases need to be distinguished because they all come within the classification referred to in our original brief upon re-argument "in each instance, some

fact was present which deprived the court of one of the essential elements of 'ordinary jurisdiction as prescribed by local laws appropriate to the occasion, and invoked in conformity with the local laws'. Either a citizen or a resident, as the case may have been, could not invoke the court's protection in the given case, or the court had no jurisdiction of the parties, or the subject matter under the given circumstances" (page 22).

The decision of the Court of Appeals should be reversed and the Courts of New York prohibited once and for all time discriminating between citizens of the several states under the mere guise of the words "resident" and "non-resident."

Respectfully submitted,

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Of Counsel.

IV may be considered in connection with point I and the exercise of a reasonable discretion.

VI. The State decisions in this case are in accord with the applicable decisions of this Court.

POINT I

The Courts of New York are invested with discretion to entertain jurisdiction of an action brought under the Federal Employers' Liability Act by a resident of Connecticut, who also happens to be a citizen of that state, against a corporation railroad common carrier, organized and existing under the laws of the State of Connecticut, doing business in the State of New York at the time of the commencement of the action and at the time of the commission of the tort, the cause of action arising out of a tort committed in the State of Connecticut.

The above is, in effect, the decision of the Court of Appeals in *Douglas* v. *The New York, New Haven and Hartford Railroad Company*, decided on May 29th, 1928, on the authority of *Murnan* v. *Wabash Railway Co., supra.*

(a) By Statute, the New York Courts are given discretionary jurisdiction.

It is contended by petitioner that the ordinary jurisdiction of New York, as prescribed by local statutes, is adequate to the occasion. Now between 1876 and 1913 it was the law of New York that where plaintiff was a non-resident, defendant a foreign corporation, and the cause of action did not arise within New York, the New York Courts did not have jurisdiction. *Robinson* v. *Oceanic Steam*

Navigation Co., 112 N. Y. 315, 321; *Hoes* v. *The N. Y. N. H. & H. R. R. Co.*, 173 N. Y. 435; *Pietraroia* v. *N. J. & H. R. R. & F. Co.*, 197 N. Y. 434; Code of Civil Procedure, Sec. 1780, prior to 1913 amendment.

From 1913 to date the action has been discretionary with the Courts. Section 1780 of the Code of Civil Procedure of New York, Laws of 1913, Chapter 60, read, in part, as follows:

> "An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:
>
> 1. Where the action is brought to recover damages for the breach of a contract made within the State, or relating to property situated within the State, at the time of the making thereof.
>
> 2. Where it is brought to recover real property situated within the State, or a chattel, which is replevied within the State.
>
> 3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State.
>
> 4. Where a foreign corporation is doing business within this State."

Section 46, of the General Corporation Law of New York, Laws of 1920, Chapter 916, derived from Section 1780 of the Code of Civil Procedure, reads as follows:

> "Action against foreign corporation.—An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action."

AUG 29 1
CHARLES ELMORE

Supreme Court of the United States

October Term, 1928

No. 312

CHARLES L. DOUGLAS,

Petitioner,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

BRIEF ON BEHALF OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

October Term, 1928

CHARLES L. DOUGLAS, *Petitioner,* vs. THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.	No. 312

BRIEF ON BEHALF OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Opinions of the Courts below

The Special Term of the Supreme Court of the State of New York rendered the following unreported opinion:

> "The Court of Appeals in the *Murnan* case (246 N. Y. 244) has settled the question as to the discretionary power of the Supreme Court at Special Term to grant this motion, and I think that that discretion should be so exercised as to relieve the Courts of this State of the burden of cases that arise in another state and in which none of the parties is a resident of this state. Motion granted" (R., 16, 17).

The Appellate Division of the Supreme Court, Second Department, affirmed the order of Special Term but wrote no opinion. 223 App. Div. 782.

The Court of Appeals, on May 29th, 1928, in 248 N. Y. Rep. 78, rendered the following memorandum opinion:

> "Judgment affirmed, with costs, on authority of *Murnan* v. *Wabash Railway Co.*, 246 N. Y. 244."

Jurisdiction of this Court

The judgment sought to be reviewed is dated May 29th, 1928 (R., 1, 2). The present petition was filed in this Court on July 26th, 1928.

In the lower Courts petitioner contended that the Supreme Court of New York was without power to refuse to exercise jurisdiction and to dismiss the complaint in an action under the Federal Employers' Liability Act brought against a railroad common carrier doing business in New York; that the policy of the State of New York in opening its courts as a matter of right to a resident, and as a matter of discretion only, to a non-resident, under like circumstances, is unconstitutional and violates Section 2 of Article 4 of the Federal Constitution. Petitioner contended that Section 47 of the General Corporation Law of New York was void in its entirety (R., 13-15).

The service of the summons and complaint was vacated and the action dismissed at Special Term (R., 4, 5). This order was unanimously affirmed by the Appellate Division of the Supreme Court (R., 18). The Court of Appeals affirmed the judgment entered upon the order (R., 1, 2).

The authority for the decision in the present case, as expressed in the opinions of the Special Term and the Court of Appeals, is *Murnan* v. *Wabash Railway Co.*, 246

N. Y. 244, which held that the Courts of New York are invested with discretion to decline jurisdiction of an action brought under the Federal Employers' Liability Act by a non-resident of the State of New York against a foreign railroad corporation, doing business in the State of New York at the time of the commencement of the action; and also that the motion of the defendant Railway Company for an order vacating the service of the summons and complaint and dismissing the action should not have been granted as a matter of law.

Statement of the Case

The plaintiff brought this action to recover for injuries alleged to have been received on December 1st, 1927, while in the defendant's employ in the defendant's railroad yards at Waterbury, Connecticut. The complaint alleges that the plaintiff and defendant were engaged in interstate commerce; that the defendant is a foreign Connecticut State railroad common carrier corporation (R., 8, 9). Plaintiff was a resident of Waterbury, Connecticut, at the time of the injury and at the time of the institution of suit (R., 10). The summons and complaint were served upon the Assistant Treasurer of The New York, New Haven and Hartford Railroad Company, who also was the person designated as the one upon whom process might be served within the State of New York (R., 6, 7). The defendant was organized under and by virtue of the laws of the State of Connecticut and was authorized to do business in the State of New York, having received a certificate for that purpose from the Secretary of the State of New York as provided by the General Corporation Law of that State (R., 7).

In its motion to dismiss the complaint the defendant urged that it would be unnecessarily burdensome to try this case in New York and that plaintiff would be more conveniently served by trial in Connecticut, where he resided, and where the accident took place (R., 7, 8). The defendant moved for an order vacating the service of the summons and complaint and dismissing the action on the ground that the cause of action having accrued wholly without the State of New York and the parties being non-residents, the jurisdiction of the Court was wholly discretionary; that the Court should, in the exercise of its discretion, decline to retain jurisdiction thereof; that Section 47, Subdivision 4, of the General Corporation Law of New York is invalid under the commerce clause of the Federal Constitution in so far as it permits the Court to assert jurisdiction; that both that section and the action constitute an unjust burden on interstate commerce (R., 5).

Question Presented

Whether the Courts of New York are invested with discretion to entertain jurisdiction of an action brought under the Federal Employers' Liability Act by a resident of Connecticut, who happens also to be a citizen of that State, against a corporation railroad common carrier, organized and existing under the laws of the State of Connecticut, doing business in the State of New York at the time of the commencement of the action, and at the time of the commission of the tort, the cause of action arising out of a tort committed in the State of Connecticut.

Argument

I. The New York Courts have the right to dismiss this action, have at least discretionary jurisdiction:

(a) By statute the New York Courts are given discretionary jurisdiction.

(b) Congress has not attempted to enlarge state jurisdiction by the Federal Employers' Liability Act.

(c) Congress cannot enlarge state jurisdiction.

II. The judgment sought to be reviewed does not violate Section 2, Article 4, of the Federal Constitution.

III. The New York Courts cannot entertain jurisdiction of this case.

IV. For the New York Courts to entertain jurisdiction would be a burden on interstate commerce, in violation of the commerce clause of the Federal Constitution.

V. The Court of Appeals and lower Courts have held that jurisdiction discretionary. In effect, they have sustained points I and II and denied points III and IV. Petitioner contends that the discretionary statute is unconstitutional, and that the New York Courts must entertain this case. Respondent contends that the discretionary statute is unconstitutional and that the New York Courts cannot entertain this case. For the purpose of this proceeding, it is not necessary to go beyond the first step in order to deny the petition, that is, to hold that New York has something to say about the matter. Of course, points III and

Section 47, of the General Corporation Law of New York, Laws of 1920, Chapter 916, derived from Section 1780 of the Code of Civil Procedure, reads as follows:

> "Action against foreign corporation by another foreign corporation or non-resident:—An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:
>
> 1. Where the action is brought to recover damages for the breach of a contract made within the State, or relating to property situated within the State at the time of the making thereof.
>
> 2. Where it is brought to recover real property situated within the State, or a chattel, which is replevied within the State.
>
> 3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State.
>
> 4. Where a foreign corporation is doing business within this State.
>
> Within the meaning of this section, a foreign corporation shall not include a corporation located in this State and created by or under the laws of the United States."

These statutory provisions dating from 1913 have been treated in *Waisikoski* v. *Phila. & Reading Coal & Iron Co.*, 228 N. Y. 581; *Gregonis* v. *Phila. & Reading Coal & Iron Co.*, 235 N. Y. 152; *Murnan* v. *Wabash Railway Co.*, *supra*.

In *Gregonis* v. *Phila. & Reading Coal & Iron Co.*, *supra*, the Court said at page 160:

> " • • • by a long line of authorities, the Courts have repeatedly refused in their discretion to entertain jurisdiction over causes of action arising out of a tort committed in a foreign state where both plaintiff and defendant were non-residents."

The history of New York in this respect has been altogether different from the history of Connecticut and the decision in *Second Employers' Liability Cases*, 223 U. S. 1, referred to by petitioner, has therefore no application. It is true that the jurisdiction of an action arising under the Federal Employers' Liability Act may not be declined by the state Courts, whose ordinary jurisdiction is adequate to the occasion, on the theory that such a statute is not in harmony with the state policy. That was what the Supreme Court of Errors of Connecticut attempted to do.

Petitioner, on page 15 of his brief, also refers to the case of *St. Louis, B. & M. Ry.* v. *Taylor*, 266 U. S. 200, in this same connection, but in that case also the ordinary jurisdiction of the state Courts, as prescribed by local laws, was appropriate to the occasion.

(b) Congress has not attempted to enlarge state jurisdiction by the Federal Employers' Liability Act.

Section 6 of the Federal Employers' Liability Act (Act of Congress, April 22, 1908, C. 149, 35 Stat. 65) reads, in part, as follows:

> "The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States • • •."

Congress, by the above statute, has not attempted to enlarge or regulate the jurisdiction of the state Courts. *Second Employers' Liability Cases, supra; Chambers* v. *Baltimore & Ohio R. R.*, 207 U. S. 142; *St. Louis & Iron Mt. Ry.* v. *Taylor*, 210 U. S. 281; *Walton* v. *Pryor, et al.*, 276 Ill. 563, in which writ of error was dismissed, in 245 U. S. 675; *Loftus* v. *Pennsylvania R. Co.*, 107 Ohio St. 352, which case was dismissed by this Court on stipulation, in 266 U. S. 639.

(c) Congress cannot enlarge state jurisdiction. New York may determine the limits of the jurisdiction of its Courts subject only to the Federal Constitution. *St. Louis & Iron Mt. Ry.* v. *Taylor, supra*, at page 285.

POINT II

The order and judgment do not violate Section Two of Article Four of the Constitution of the United States.

In the first place, New York, by statute and decision, distinguishes between "residents" and "citizens." The same distinction, which is not merely verbal, has been made by this Court and the Courts of other states. *Anglo-American Provision Co.* v. *Davis Provision Co.*, 191 U. S. 373; *La Tourette* v. *McMaster*, 248 U. S. 465; *Maxwell* v. *Bugbee*, 250 U. S. 525; *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60; *Canadian Northern R. Co.* v. *Eggen*, 252 U. S. 553; *Davis* v. *Farmers' Co-operative Equity Co.*, 262 U. S. 312; *Robinson* v. *Oceanic Steam Navigation Co., supra; Central R. R. Co.* v. *Georgia, etc., Co.*, 32 S. C. 319; *Loftus* v. *Pennsylvania R. Co., supra.*

Under Subdivision 4 of Section 47 of the General Cor-

poration Law of New York, *supra*, an action may be brought against a foreign corporation by a non-resident where a foreign corporation is doing business within this State. It has been declared that it is discretionary, under this provision, whether the Courts will entertain such action. We would have exactly the same result—discretionary jurisdiction—in the case of a citizen of New York who might be residing in Connecticut, who sues a foreign corporation doing business within this State, on a transitory cause of action arising outside of the State. The discrimination is not between citizens and non-citizens, but between residents and non-residents. In the case of a Connecticut citizen residing in New York, the Courts of New York would not have discretionary jurisdiction, but would have to entertain the action. The result—compulsory jurisdiction—would be the same as in the case of the New York citizen, residing in New York. In neither case is citizenship the test, or of any importance whatsoever.

Aside from this distinction, a discrimination is not unconstitutional, even as between citizens of different states if there is a "reasonable ground for the diversity of treatment." *Travis* v. *Yale & Towne Mfg. Co.*, *supra*, at page 79. We see this in cases involving statutes of limitation and taxation. *Canadian Northern R. Co.* v. *Eggen*, *supra*; *La Tourette* v. *McMaster*, *supra*.

The Courts may consider the interests of the people of the State in declining jurisdiction. *Pietraroia* v. *N. J. & H. R. R. & F. Co.*, *supra*; *Hoes* v. *The N. Y. N. H. & H. R. R. Co.*, *supra*. The Courts may consider the interests of the parties. In *Davis* v. *Farmers' Co-operative Equity Co.*, *supra*, this Court took into consideration the heavy expense to carriers.

Instead of answering the complaint respondent made this motion at the very beginning of the case (R., 5). Both plaintiff and defendant were and are to be found in Connecticut (R., 7-9). The accident occurred in Connecticut (R., 6, 7, 9). The parties can litigate at home without the expense of calling witnesses from Connecticut to New York. The record shows no fact objection to trial in Connecticut, other than the allegation that the respondent is not without powerful influence in Connecticut and that the verdicts in that State are small and inadequate in cases for personal injuries against this respondent. These are bare assertions appearing in affidavits in opposition to respondent's motion (R., 13, 16).

In the case of *Loftus* v. *Pennsylvania R. Co.*, *supra*, Loftus, an employee of the Pennsylvania Railroad Company, was injured in Pennsylvania. He was a resident and citizen of that State and the Railroad was a corporation organized under the laws of Pennsylvania, but operated also in Ohio. A suit was brought in Ohio and the Railroad Company moved to quash the service of the summons. The statute excluded from the jurisdiction of the State Courts of Ohio all causes against the persons and companies therein referred to for injuries to person or property or for wrongful death occurring without the State of Ohio, unless the claimant was a resident of that State. The action was brought under the Federal Employers' Liability Act. It was held that the Federal law-making powers could not confer compulsory jurisdiction upon the trial Courts of Ohio. The Federal statute created the right and the states provided the remedy by establishing courts and declaring their jurisdiction.

It was contended that the statute of Ohio violated Section 2 of Article 4 of the Federal Constitution. But the Court said that the dominant purpose of this constitutional provision was to prevent arbitrary and unreasonable discrimination in each state in favor of its own citizens and against the citizens of other states (p. 363). The Court pointed out that the statute was based upon residence without regard to citizenship. It held that residence and citizenship were not synonymous.

Section 2 of Article 4 of the Federal Constitution looks to citizenship and not to residence. There has been a reasonable regulation of the internal affairs of New York State by way of discretionary jurisdiction.

POINT III

The New York Courts cannot entertain jurisdiction of this case

To do business within the State of New York, it was necessary for The New York, New Haven and Hartford Railroad Company, a foreign corporation, to procure a certificate, and before obtaining the certificate it had to designate a person upon whom process against the corporation might be served within the State.

Section 110, Subdivision 1, of the Stock Corporation Law, being Chapter 28, Laws of 1909, as amended by Chapter 594, Laws of 1917, reads, in part, as follows:

> "No foreign stock corporation other than a money corporation, shall do business in this state without having first procured from the secretary of

> state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation created under the laws of this state for such or similar business, • • •."

Chapter 787, of the Laws of 1923, being Section 111, of the Stock Corporation Law of New York, provides for the designation of a person upon whom process may be served. It would appear that the New York statute "was not intended to give the state Courts jurisdiction over foreign corporations by service on agents appointed thereunder, in transitory actions arising in another state." *Missouri Pac. R. Co.* v. *Clarendon Co.*, 257 U. S. 533. In transitory actions the tendency should be to restrict to the business done in New York particularly when both parties are non-residents. The statute of New York relating to discretionary suits should be interpreted in the light of the statute relating to designated agent and doing business in New York.

POINT IV

For the Courts of New York to entertain jurisdiction of this action would be an undue burden on interstate commerce.

We have already quoted Section 47, Subdivision 4, of the General Corporation Law of New York, whereby an action against a foreign corporation may be brought by a non-resident, where the foreign corporation is doing business within New York.

It has been held not to be an unreasonable burden upon interstate commerce to require a designated agent to accept service for causes of action arising within the State. *International Harvester Co.* v. *Kentucky*, 234 U. S. 579. But we submit that we do not reach the same result where the cause of action arises outside. *Old Wayne Life Association* v. *McDonough*, 204 U. S. 22; *Simon* v. *Southern Ry. Co.*, 236 U. S. 115; *Davis* v. *Farmers' Co-operative Equity Co., supra; Weinard* v. *Chicago, M. & St. P. Ry. Co.*, 298 Fed. 977, District Court, Fourth Division.

The Federal Employers' Liability Act makes the jurisdiction of the Courts of the United States, in cases under the Act, concurrent with that of the Courts of the several states. Congress has expressly imposed a burden on interstate commerce where suits are brought in the Federal Courts, but has imposed no such burden where suits are brought in the state Courts.

POINT V

If the Courts of the State of New York have discretionary jurisdiction and if there has been no abuse of that discretion in refusing to entertain this case, then this petition for writ of certiorari should be denied.

POINT VI

The state decisions in this case are in accord with the applicable decisions of this Court.

CONCLUSION

We respectfully submit that the present petition should be denied.

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Supreme Court of the United States

CHARLES L. DOUGLAS,
Petitioner,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

BRIEF ON BEHALF OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

Opinions of the Courts below

The Special Term of the Supreme Court of the State of New York rendered the following unreported opinion:

> "The Court of Appeals in the *Murnan* case (246 N. Y. 244) has settled the question as to the discretionary power of the Supreme Court at Special Term to grant this motion, and I think that that discretion should be so exercised as to relieve the Courts of this State of the burden of cases that arise in another state and in which none of the parties is a resident of this State. Motion granted" (R., 16, 17).

The Appellate Division of the Supreme Court, Second Department, affirmed the order of Special Term, but wrote no opinion. 223 App. Div. 782 (R., 18).

The Court of Appeals, on May 29th, 1928, in 248 N. Y. 580, rendered the following memorandum opinion:

> "Judgment affirmed, with costs, on authority of *Murnan* v. *Wabash Railway Co.*, 246 N. Y. 244."

Jurisdiction of this Court

The judgment sought to be reviewed is dated May 29th, 1928 (R., 1, 2). The present petition was filed in this court on July 26th, 1928.

The service of the summons and complaint was vacated and the action dismissed at Special Term (R., 4, 5). This order was unanimously affirmed by the Appellate Division of the Supreme Court (R., 18). The Court of Appeals affirmed the judgment entered upon the order (R., 1, 2).

The authority for the decision in the present case, as expressed in the opinions of the Special Term and the Court of Appeals, is *Murnan* v. *Wabash Railway Co.*, *supra*, which held that the courts of New York are invested with discretion to decline jurisdiction of an action brought under the Federal Employers' Liability Act by a non-resident of the State of New York against a foreign railroad corporation, doing business in the State of New York at the time of the commencement of the action; and also that the motion of the defendant Railway Company for an order vacating the service of the summons and complaint and dismissing the action should not have been granted as a matter of law.

Statement of the Case

The plaintiff-petitioner brought this action to recover for injuries alleged to have been received on December 1st, 1927, while in the defendant's employ in the defendant's railroad yards at Waterbury, Connecticut. The complaint alleges that the plaintiff and defendant were engaged in interstate commerce; that the defendant is a foreign Connecticut State railroad common carrier corporation (R., 8, 9). Plaintiff was a resident of Waterbury, Connecticut, at the time of the injury and at the time of the institution of the suit (R., 10). He was and is a citizen of the United States, and a citizen and resident of the State of Connecticut (R., 17).

The summons and complaint were served upon the respondent-defendant in the City of New York, on December 22nd, 1927 (R., 2). The service was made upon Frank E. Hall, Assistant Treasurer of The New York, New Haven and Hartford Railroad Company (R., 6). Frank E. Hall is the person designated upon whom process may be made within New York State (R., 7, 9).

The respondent is organized under and by virtue of the laws of the State of Connecticut, and is authorized to do business in the State of New York, and was and is engaged in interstate commerce. It is a railroad corporation. It applied for and received a certificate to do business in New York from the Secretary of the State as provided by the General Corporation Law of New York (R., 7).

In its motion to dismiss the complaint the respondent urged that it would be unnecessarily burdensome to try

this case in New York and that petitioner would be more conveniently served by trial in Connecticut, where he resided, and where the accident took place (R., 7, 8). The respondent moved for an order vacating the service of the summons and complaint and dismissing the action on the ground that the cause of action having accrued wholly without the State of New York and the parties being non-residents, the jurisdiction of the court was wholly discretionary; that the court should, in the exercise of its discretion, decline to retain jurisdiction thereof; that § 47, Subdivision 4, of the General Corporation Law of New York is invalid under the commerce clause of the federal Constitution in so far as it permits the court to assert jurisdiction; that both that section and the action constitute an unjust burden on interstate commerce (R., 5).

Summary of Respondent's Argument

I. The courts of New York are invested with discretion to entertain jurisdiction of an action brought under the Federal Employers' Liability Act by a resident of Connecticut, who also happens to be a citizen of that State, against a corporation railroad common carrier, organized and existing under the laws of the State of Connecticut, doing business in the State of New York at the time of the commencement of the action and at the time of the commission of the tort, the cause of action arising out of a tort committed in the State of Connecticut.

(a) Congress has not attempted to enlarge state jurisdiction by the Federal Employers' Liability Act.

(b) Congress cannot enlarge state jurisdiction.

(c) By statute and construction, the New York courts are given discretionary jurisdiction.

(d) Petitioner's argument that the Supreme Court of the State of New York is without power to refuse jurisdiction, and to dismiss a complaint, in an action under the Federal Employers' Liability Act, against a railroad common carrier, doing business in the State of New York, is not tenable.

II. The order and judgment do not violate § 2, of Article IV of the Constitution of the United States.

(a) The discrimination alleged under § 2 of Article IV is not between citizens and non-citizens, but between residents and non-residents.

(b) A discrimination is not unconstitutional, even as between citizens of different States, if there is a reasonable ground for the diversity of treatment.

(c) Because the exercise of jurisdiction would be a burden on interstate commerce, the refusal to exercise jurisdiction is at least reasonable and, therefore, not a violation of § 2 of Article IV of the Constitution.

(d) Under New York statutes respondent has not consented to more than discretionary jurisdiction.

(e) To treat this case as one of compulsory jurisdiction would impair the obligation of the contract between the respondent and the State of New York in violation of Article I, § 10, paragraph 1 of the United States Constitution.

(f) Petitioner's argument as to alleged violation of Article IV, § 2 of the Constitution is invalid.

ARGUMENT

POINT I

The courts of New York are invested with discretion to entertain jurisdiction of an action brought under the Federal Employers' Liability Act by a resident of Connecticut, who also happens to be a citizen of that State, against a corporation railroad common carrier, organized and existing under the laws of the State of Connecticut, doing business in the State of New York at the time of the commencement of the action and at the time of the commission of the tort, the cause of action arising out of a tort committed in the State of Connecticut.

The above is, in effect, the decision of the Court of Appeals in *Douglas* v. *The New York, New Haven and Hartford Railroad Company*, decided on May 29th, 1928, on the authority of *Murnan* v. *Wabash Railway Co., supra.*

(a) Congress has not attempted to enlarge state jurisdiction by the Federal Employers' Liability Act.

In the first place, this is indicated by the wording of the statute itself. The Act of Congress of April 22nd, 1908, c. 149, § 6, as amended by the Act of April 5th, 1910, c. 143, § 1, being 35 Stat. 66 and 36 Stat. 291, reads in part as follows:

> "Under this Act an action may be brought in a (circuit court) of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United

> States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

In the second place, the effect of the use of the word "concurrent" is analogous to its use in the Eighteenth Amendment of the Constitution. It does not mean joint jurisdiction any more than "concurrent power" in the Eighteenth Amendment means joint power. *National Prohibition Cases*, 253 U. S. 350, 387. Furthermore, neither the statute nor the Amendment is "the source of the power of the states." *United States* v. *Lanza*, 260 U. S. 377, 381; *Hebert* v. *Louisiana*, 272 U. S. 312, 315.

In the third place, in the Act quoted we find the words "competent jurisdiction," referring to the state courts. Now the Judicial Code, § 28, Act March 3rd, 1911, c. 231, § 28, 36 Stat. 1094, as amended, Act January 20th, 1914, c. 11, 38 Stat. 278, reads in part as follows:

> "Provided, That no case arising under an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases,' approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

Here again are the words "competent jurisdiction." Manifestly Congress intended not to enlarge state jurisdiction, for otherwise the phrasing would be totally unnecessary.

The decisions of this and other courts bear out the

statutory interpretation that we have given. In *Chambers* v. *Baltimore & Ohio R. R.*, 207 U. S. 142, it was held that "subject to the restrictions of the Federal Constitution, the State may determine the limits of the jurisdiction of its Courts, and the character of the controversies which shall be heard in them" (p. 148). While this case was decided in 1907 and consequently could not refer to the effect of the Act under consideration, it enunciated a general principle of long standing.

The cause of action in *Second Employers' Liability Cases*, 223 U. S. 1, was based on the 1908 Act. The Supreme Court of Errors of Connecticut had erroneously expressed the opinion that the federal courts had exclusive jurisdiction. This court said that it was not the intention to restrict the enforcement of the rights to the federal courts. But the jurisdiction of the state courts must be adequate to the occasion. Congress did not attempt to enlarge or regulate this jurisdiction. The States can still prescribe their modes of procedure. The States can still determine, by local laws, the jurisdiction of their courts. (See bottom of p. 56, top of p. 57.)

In *Walton* v. *Pryor, et al.*, 276 Ill. 563, 245 U. S. 675, suit was brought under the Federal Employers' Liability Act, the death occurring in Missouri. The Illinois law provided that no action should be brought to recover damages for death occurring outside of Illinois. That State refused to entertain the suit, the court saying:

> "The Supreme Court of the United States has said that there has been no attempt of Congress to enlarge the jurisdiction of the State courts but only to require its exercise consistently with local laws, and the enforcement of liability for damages occa-

sioned by a death outside of the State is not consistent with such laws" (pages 570, 571).

In *Loftus* v. *Pennsylvania R. Co.*, 107 Ohio St. 352, 266 U. S. 639, an action under the Federal Employers' Liability Act was denied a hearing because the law of the State excluded from the jurisdiction of its courts all causes against railroads for injuries suffered outside the State, unless claimant was a resident.

Loftus, a resident and citizen of Pennsylvania, an employee of the Pennsylvania Railroad Company, a corporation organized under the laws of Pennsylvania, brought suit under the Federal Employers' Liability Act to recover damages for injuries received in Pennsylvania. The suit was brought in Ohio, where the defendant operated. Defendant moved to quash the service of the summons. It was held that the federal lawmaking power could not confer compulsory jurisdiction upon the trial courts of Ohio; that the federal statute created the right but the States provided the remedy of establishing courts and declaring their jurisdiction.

Petitioner says this case merely holds that the Federal Act does not confer upon a non-resident plaintiff injured outside of the State a greater right than upon a citizen of Ohio injured in Ohio (p. 25 of petitioner's Brief). But defendant did business in Ohio, and if petitioner's previous contention is correct Congress made provision that plaintiff could maintain this action in Ohio, regardless of local laws (see p. 7 of petitioner's Brief). The early contention goes too far. If the tort is foreign in origin the Ohio venue statute bars a suit by a non-resident.

(b) Congress cannot enlarge state jurisdiction.

Was it not held by Mr. Justice Story in *Martin* v. *Hunter*, 1 Wheat. 304, that Congress could not confer any of the judicial power of the United States upon the state courts? The situation was clearly explained by Mr. Justice Washington in *Houston* v. *Moore*, 5 Wheat. 1,—that Congress cannot confer any of the judicial power of the United States upon the state courts, but the latter may exercise jurisdiction even over causes arising out of the acts of Congress, if they have the authority in their own inherent powers and if Congress has not made the jurisdiction of the federal courts exclusive.

In *Ruckworth* v. *Judges of Hudson Common Pleas*, 58 N. J. L. 97, the relator was refused naturalization in New Jersey solely upon the ground his application was not made in accordance with the New Jersey statute. The federal statute involved had expressly selected the state courts as one of the federal agencies to hear and act upon application for naturalization.

Held:

> **"* * * Congress is without power to interfere with or control state courts, except in so far as the federal courts have appellate jurisdiction" (p. 100).**
>
> **"The state establishes its own courts, defines their jurisdiction, appoints its judges and pays their salaries" (p. 101).**

The opinion in *Murnan* v. *Wabash Railway Co.*, 246 N. Y. 244, on the authority of which this case was decided by the Court of Appeals, reads on page 248 as follows:

"The courts of New York exercise their discretion in all other cases where a tort action is brought by one non-resident against another under the laws of another State. The practice may be anomalous but it is well established. That Congress has undertaken to regulate the exercise of jurisdiction by our courts by making compulsory what in other similar cases is discretionary, seems an unreasonable conclusion and a resulting invasion of the powers of our tribunals as heretofore exercised. We conclude that a litigant who brings his action under the Federal Employers' Liability Act stands before the court in no different attitude than a litigant who brings his action under the statute of a sister State. He may not be cast out because he is suing under the act of Congress. He may not enforce his rights merely because he is suing under the act."

Petitioner's claim amounts to this—that because he sues under a federal statute he is entitled, *ipso facto*, to sue in a state court although otherwise he would not be so entitled. There is no dispute that the Act in question is part of the supreme law of the land. *Claflin* v. *Houseman*, 93 U. S. 130, 137. But the Act does not impose jurisdiction except upon the federal courts. The laws of the State must determine whether "the State has cognizance of the cause of action and may acquire jurisdiction of the parties." *Trapp* v. *Baltimore & Ohio R. Co.*, 283 Fed. 655, at p. 656. Each State decides for itself the jurisdictional limitations of its courts.

It is essential that the state jurisdiction, the state statute creating and defining the court, extends to the very case. *Walton* v. *Pryor, supra; Rushworth* v. *Judges of Hudson Common Pleas, supra; Warren, Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545, 546;

Anglo-American Provision Co. v. *Davis Provision Co.*, 191 U. S. 373.

Furthermore, a State may refuse to entertain jurisdiction, notwithstanding the effect is to exclude an action under a federal statute. *Walton* v. *Pryor, supra*, denied jurisdiction to an action brought under the Federal Employers' Liability Act because of a provision of a state statute.

This court said in *Anglo-American Provision Co.* v. *Davis Provision Co., supra*, that even the constitutional clause of full faith and credit did not impose jurisdiction upon a state court in a suit upon a judgment where the state court rendering the judgment did not have jurisdiction of the original cause of action.

We may summarize this entire argument in the words of Charles Warren in an article entitled "Federal Criminal Laws and the State Courts," 38 Harvard Law Review 545, at page 546:

> "While Congress has no power to *force* jurisdiction upon a State Court, it has the power to *leave* jurisdiction to a State Court."

See also *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, at page 285.

Finally we come to this legitimate conclusion, that if Congress confers concurrent jurisdiction this means nothing more than the denial of exclusiveness, and the States may take jurisdiction, not by reason of the Congressional Act, but by reason of their own laws. State jurisdiction, to put it another way, arises from its own

laws, unaided by federal legislation, at times limited by federal legislation under the federal Constitution.

(c) By statute and construction, the New York courts are given discretionary jurisdiction.

It is contended by petitioner that the ordinary jurisdiction of New York, as prescribed by local statutes, is adequate to the occasion. Now between 1876 and 1913 it was the law of New York that where plaintiff was a non-resident, defendant a foreign corporation, and the cause of action did not arise within New York, the New York courts did not have jurisdiction. *Robinson* v. *Oceanic Steam Navigation Co.*, 112 N. Y. 315, 321; *Hoes* v. *The N. Y., N. H. & H. R. R. Co.*, 173 N. Y. 435; *Pietraroia* v. *N. J. & H. R. R. & F. Co.*, 197 N. Y. 434; Code of Civil Procedure, § 1780, prior to 1913 amendment.

From 1913 to date the action has been discretionary with the courts. § 1780 of the Code of Civil Procedure of New York, Laws of 1913, Chapter 60, reads, in part, as follows:

> "An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:
>
> • • • • • • • • •
>
> "4. Where a foreign corporation is doing business within this State."

This became part of § 47, of the General Corporation Law of New York, Laws of 1920, Chapter 916.

§ 46, of the General Corporation Law of New York, Laws of 1920, Chapter 916, derived from § 1780 of the Code of Civil Procedure, reads as follows:

> "Action against foreign corporation.—An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action."

These statutory provisions dating from 1913 have been treated in *Waisikoski* v. *Phila. & Reading Coal & Iron Co.*, 228 N. Y. 581; *Gregonis* v. *Phila. & Reading Coal & Iron Co.*, 235 N. Y. 152; *Murnan* v. *Wabash Railway Co.*, *supra*.

In *Gregonis* v. *Phila. & Reading Coal & Iron Co.*, *supra*, the Court said, at page 160:

> "* * * by a long line of authorities, the Courts have repeatedly refused in their discretion to entertain jurisdiction over causes of action arising out of a tort committed in a foreign state where both plaintiff and defendant were non-residents."

(d) Petitioner's argument that the Supreme Court of the State of New York is without power to refuse jurisdiction, and to dismiss a complaint, in an action under the Federal Employers' Liability Act, against a railroad common carrier, doing business in the State of New York, is not tenable.

Petitioner's Argument starts with a discussion of § 6, second clause, of the Federal Employers' Liability Act (see pp. 7, 8, 9 of petitioner's Brief). The argument is based upon false premises such as: the plaintiff can maintain his action in the district he chooses; Congress provided that the state courts should have jurisdiction; Congress has explicitly conferred a right to bring an action in the New York Supreme Court; Congress has provided that the state courts shall have concurrent jurisdiction with the federal

courts (see pp. 7 and 8 of petitioner's Brief). The conclusions are then reached that no state court can nullify the Act of Congress, that Congress had the right to confer this jurisdiction upon the state courts, and that its provisions are supreme; that no state court can avoid or refuse to accept the jurisdiction conferred; that Congress has not attempted to increase the jurisdiction of state courts; that Congress compels the state courts to exercise a jurisdiction they already possess (petitioner's Brief, pp. 7, 8, 11).

Throughout petitioner lays great stress upon *Second Employers' Liability Cases (Mondou)*, 223 U. S. 1, but does not quote:

> "there is not here involved any attempt by Congress to enlarge or regulate jurisdiction of state courts, or to control or affect their modes of procedure, * * *."

Petitioner refers to *Taylor* v. *Taylor*, 232 U. S. 363, which holds that plaintiff's share of a settlement in an action under the Federal Employers' Liability Act is determined by that Act.

Petitioner refers to *Toledo, St. L. & W. R. R.* v. *Allen*, 276 U. S. 165, which holds that the Act of Congress under which plaintiff sought recovery "took possession of the field of liability of carriers by railway for injuries sustained by employees while engaged in interstate commerce * * *" (p. 168).

Petitioner refers to *Missouri, et al.* v. *Taylor*, 266 U. S. 200, which expressly said that the federal right under the Carmack Amendment was "enforceable in a State court whenever its ordinary jurisdiction, as prescribed by local

laws, is appropriate to the occasion, and is invoked in conformity with those laws" (p. 208).

There is no claim by respondent of a right to refuse jurisdiction because petitioner's suit is based on a federal law (see petitioner's Brief, p. 34, quoting from Senate Report of March 22, 1910).

We find on page 31 of petitioner's Brief a quotation from a speech of Senator Borah and statements made by Representatives Sterling and Webb, but these quotations do not say that the state courts must exercise jurisdiction.

POINT II

The Order and Judgment do not violate § 2 of Article IV of the Constitution of the United States.

(a) The discrimination alleged under Article IV, § 2 of the federal Constitution is not between citizens and non-citizens, but between residents and non-residents.

Under subd. 4 of § 47 of the General Corporation Law of New York, *supra*, an action may be brought against a foreign corporation by a non-resident where a foreign corporation is doing business within New York. In the case of a Connecticut citizen residing in New York, the courts of New York would not have discretionary jurisdiction, but would have to entertain the action. The result—compulsory jurisdiction—would be the same as in the case of the New York citizen residing in New York. In neither case is citizenship the test, or of any importance whatsoever.

This same distinction, which is not merely verbal, has been made by this court and the courts of several States. *Steigleder* v. *McQuesten*, 198 U. S. 141; *LaTourette* v. *McMaster*, 248 U. S. 465; *Maxwell* v. *Bugbee*, 250 U. S. 525; *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60; *Canadian Northern R. Co.* v. *Eggen*, 252 U. S. 553; *Cummings* v. *Wingo*, 31 S. C. 427; *Central R. R. Co.* v. *Georgia, etc., Co.*, 32 S. C. 319; *Loftus* v. *Pennsylvania R. Co.*, *supra*.

(b) A discrimination is not unconstitutional, even as between citizens of different States, if there is a reasonable ground for the diversity of treatment, and we find "reasonable ground for the diversity of treatment." *Travis* v. *Yale & Towne Mfg. Co.*, *supra*, at p. 79; *Canadian Northern Ry. Co.* v. *Eggen*, *supra*; 1 *Cooley, Constitutional Limitations* (8th ed.) 49.

In dicta this court has said that a citizen of one State has the privilege of bringing suit in the courts of another State. *Ward* v. *Maryland*, 12 Wall. 418, 430; *Slaughter-House Cases*, 16 Wall. 36, 76; *Cole* v. *Cunningham*, 133 U. S. 107, 113, 114; *Chambers* v. *Baltimore & O. R. R.*, *supra*; *Missouri Pac. R. R.* v. *Clarendon Co.*, 257 U. S. 533, 535.

But the courts have not literally applied the "equal privileges" clause. *Minor* v. *Happersett*, 21 Wall. 162; *McCready* v. *Virginia*, 94 U. S. 391; *Heim* v. *McCall*, 239 U. S. 175; *Ferry* v. *Spokane P. & S. Ry.*, 258 U. S. 314; *Ballard* v. *Hunter*, 204 U. S. 241. In *Central Loan & Trust Co.* v. *Campbell*, 173 U. S. 84, 97, a non-resident's property was attached without requiring plaintiff to give a bond, although a bond was required in the attachment of resident's

property. *Hess* v. *Pawloski*, 274 U. S. 352, allowed a different procedural remedy against a non-resident. *Canadian Northern Ry.* v. *Eggen, supra*, made clear that a non-resident might not have the same rights as a resident. In taxation matters we find permissible distinctions. *Travellers' Insurance Co.* v. *Connecticut*, 185 U. S. 364; *Shaffer* v. *Carter*, 252 U. S. 37.

New York's judicial policy in this regard is based upon reason. The courts "have never refused to entertain jurisdiction of a cause of action arising upon contract," even though both parties reside in other States. *Smith* v. *Crocker*, 14 App. Div. 245, 250; cited in *Furbush* v. *Nye*, 17 App. Div. 325, 326, and other cases. In *Smith* v. *Crocker, supra*, we find this sentence: "We are referred to a number of cases (*Ferguson* v. *Neilson*, 33 N. Y. St. Repr. 814; *Robinson* v. *Oceanic Steam Nav. Co.*, 112 N. Y. 315) in which it was held that the courts of this State will not retain jurisdiction of and determine an action for tort between parties residing in other States on causes of action arising out of the State, as a matter of public policy, unless special reasons are shown to exist which make it necessary or proper so to do" (p. 249).

In respect of actions for tort, has New York acted reasonably and adequately? This is the test of *Canadian Northern Ry. Co.* v. *Eggen, supra*, which quotes from *Robinson* v. *Oceanic Steam Navigation Co., supra*. Jurisdiction was refused in the latter case because of a statute and the Court of Appeals said the discrimination between resident and non-resident plaintiffs was probably based upon reasons of public policy (p. 323). New York "courts should not be vexed with litigation between non-resident

parties over causes of action which arose outside of our territorial limits" (pp. 323, 324). In *Ferguson* v. *Neilson, supra*, we find this: "Our courts are not supported by the people for any such purpose." In *Collard* v. *Beach*, 81 App. Div. 582, 93 App. Div. 339, is this: "• • • the calendars of the courts of this State are congested • • • it would impose an undue burden upon the courts of our State if the practice were established of assuming jurisdiction in such cases" (pp. 340, 341). It is a simple and transparent device. The Court of Appeals in *Hoes* v. *N. Y., N. H. & H. R. R. Co., supra*, said: "If this can be done it will open wide the floodgates of litigation in similar cases, establish a new legal industry and impose thereby upon our already over worked courts the obligation to try actions imported from a foreign jurisdiction" (p. 441). It impedes the administration of justice, it burdens the people of the State with expense, it is solely for the benefit of residents of other States. (Please see *Pietraroia* v. *N. J. & H. R. R. & F. Co., supra.*) It would be reasonable to take into consideration the heavy expense to carriers. *Davis* v. *Farmers' Co-operative Equity Co.*, 262 U. S. 312.

Respondent made the motion to dismiss at the outset (R., 5). Both petitioner and respondent were and are in Connecticut (R., 6, 7, 9). The record shows no fact objection to trial in Connecticut other than the allegation of powerful influence of respondent in Connecticut and that verdicts in that State are small and inadequate in cases for personal injury against this respondent (R., 13, 16).

The Court of Appeals decided the *Douglas* case on the authority of *Murnan* v. *Wabash Railway Co., supra.* It becomes pertinent to define the limitations and purport of the

latter ruling. After setting out § 47 of the General Corporation Law (Cons. Laws, ch. 23) the opinion reads:

> "Although the rule prohibits a court of general jurisdiction from refusing to exercise its jurisdiction in its discretion, it has often been held that the courts of this State may refuse in their discretion to entertain jurisdiction over causes of action arising out of a tort committed in a sister State where both the plaintiff and defendant are non-residents (*Gregonis v. P. & R. Coal & Iron Co.*, 235 N. Y. 152, 160, and cases cited). While no controlling reason compelled, the Special Term refused to assume jurisdiction; it refused, it would seem, for reasons of convenience, to hear the case and vacated the service of the summons under the authorities referred to" (pp. 246, 247).

> "The courts of New York exercise their discretion in all other cases where a tort action is brought by one non-resident against another under the laws of another State" (p. 248).

> "This motion of the defendant for an order vacating the service of the summons should not have been granted as matter of law. Neither should it have been denied except in the exercise of a sound discretion" (p. 248).

> "It is urged with force that it was reasonable for a resident of Connecticut in reduced circumstances to sue the defendant in New York, where he could obtain service of summons, rather than to go to Indiana where defendant was incorporated, or to Michigan where the accident occurred. As we have the case before us on a question of law only and it appears that the Appellate Division has not considered the question of discretion, we may properly remit the case to that court to review the order from that point of view" (p. 249).

(c) Because the exercise of jurisdiction would be a burden on interstate commerce, the refusal to exercise jurisdiction is at least reasonable and, therefore, not a violation of § 2 of Article IV of the Constitution.

In *Davis* v. *Farmers' Co-operative Equity Co., supra,* the defendant may not have been "doing business" in the State, but by discussion of the commerce clause this court treated it otherwise. The case is authority for the proposition that a suit by a non-resident against a foreign railroad corporation on a foreign cause of action is an unreasonable burden on interstate commerce. We find support in *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197, 205; *Atchison, etc., Ry.* v. *Wells*, 265 U. S. 101; *Weinard* v. *Chicago, M. & St. P. Ry. Co.*, 298 Fed. 977. It is not an unreasonable burden on interstate commerce to require a designated agent to accept service for causes of action arising within the State. *International Harvester Co.* v. *Kentucky*, 234 U. S. 579. This very distinction lends support to the proposition. *Hoffmann* v. *Foraker*, 274 U. S. 21, is not in point because there the railroad was not a foreign corporation and was sued in the State of its incorporation.

The Federal Employers' Liability Act makes the jurisdiction of the courts of the United States, in cases under the Act, concurrent with that of the courts of the several States. Congress has expressly imposed a burden on interstate commerce where suits are brought in the federal courts, but has imposed no such burden where suits are brought in the state courts.

(d) Under New York statutes respondent has not consented to more than discretionary jurisdiction.

The pertinent statutory provisions in relation to foreign corporations, doing business within the State of New York, are to be found in L. 1927, ch. 425, as follows:

"§ 15. *Authorization of foreign corporations, other than moneyed corporations, to do business within the state.* A foreign corporation, other than a moneyed corporation, shall not do business in this state without having first obtained from the secretary of state a certificate of authority. To obtain such certificate, the corporation shall comply with the following conditions:

"1. It shall present to the secretary of state a statement and designation in its corporate name, signed and acknowledged by its president or a vice-president, or its secretary, treasurer, managing director or attorney in fact, which shall set forth the state or country of its incorporation, the place where its office within this state is to be located, the business which it proposes to do within this state, and a designation of the secretary of state as its agent upon whom all process in any action or proceedings against it may be served within this state.

• • • • •

"§ 16. *Restrictions.* The following provisions shall be applicable to a statement and designation under section fifteen:

"1. It shall not be filed if it sets forth any business for which a corporation or corporations could not be formed under a general law of this state, other than the banking law or the insurance law.

"2. If it sets forth any business for which a domestic corporation could be formed only with the consent or approval of a justice of the supreme court, a state officer, state department, or state or local board or body, the consent or approval of such justice, officer, department, board or body shall be endorsed thereon, or annexed thereto.

"§ 16-a. *Certificate of authority.* 1. The secretary of state, subject to the provisions of sections six and sixteen, and upon payment of the fees required by law, shall file the documents prescribed in section fifteen and shall issue to the corporation a certificate of authority, stating the date of the filing of such documents and that the corporation is authorized to do, in this state, the business set forth in the statement and designation, a copy of which shall be annexed thereto.

"2. Upon the issuance of such certificate the corporation may do, in this state, any of the business referred to in the certificate of authority and no other.

"§ 16-b. *Existing authority and designation continued.* Every corporation which, at the time this section takes effect, has authority to do business in the state pursuant to a certificate heretofore granted by the secretary of state, shall continue to have such authority. The designation heretofore made by any such corporation of a person upon whom all process against it may be served within the state shall continue in full force and effect until the filing in the office of the secretary of state of a written revocation by the corporation of such designation, or until the death, resignation or removal from the state of the person so designated, and thereupon the secretary of state shall become the agent of the corporation upon whom all process in any action or proceeding against it may be served within the state."

* * * * *

"§ 16-g. *Contracts of unauthorized corporation not enforceable.* A foreign corporation, other than a moneyed corporation, doing business in this state shall not maintain any action in this state upon any contract made by it in this state, unless before the making of such contract it shall have obtained a certificate of authority. This prohibition shall also ap-

> ply to any successor in title of such foreign corporation and to any person claiming under such successor or such foreign corporation or under either of them."

Can an action be maintained against a foreign corporation doing business within a State, the cause of action not arising within the State and not arising out of business done within the State, where service is made upon the designated agent, who is also an officer, when the corporation has not expressly consented to jurisdiction involving foreign transitory causes of action? In *Bagdon* v. *Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432, it was held by the Court of Appeals that the actions in which the designated agent is to represent the corporation are not limited. We appreciate that the respondent "takes the risk of the construction that will be put upon the statute and the scope of the agency by the State Court." *Mitchell Furn. Co.* v. *Selden Breck Co.*, 257 U. S. 213, 216. On the other hand, we have the statement of this court in *Missouri Pac. R. R. Co.* v. *Clarendon Co.*, *supra*, as follows:

> "Indeed, so clear is this that, in dealing with statutes providing for service upon foreign corporations doing business in the State upon agents whose designation as such is especially required, this court has indicated a leaning toward a construction where possible, that would exclude from their operation causes of action not arising in the business done by them in the State. *Mitchell Furniture Co.* v. *Selden Breck Construction Co.*, *ante*, 213; *Old Wayne Mutual Life Association* v. *McDonough*, 204 U. S. 8, 22; *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, 130" (pp. 535, 536).

To effect service upon a foreign corporation in accordance

with the laws of New York we must have a case "where constitutionally and legally a foreign corporation can be made a defendant in our courts." *Dollar Co.* v. *Canadian C. & F. Co.*, 220 N. Y. 270, 275. We must look beyond the personal service upon the respondent. Jurisdiction may be acquired by express consent but we must look to the terms of the consent. It is also true that this court has worked out, in some instances, the fiction of an implied consent. A question arises whether mere corporate presence suffices to give jurisdiction and certainly it does not if the cause of action arose in another State and service is made upon a public official. *Old Wayne Life Association* v. *McDonough*, 204 U. S. 8; *Simon* v. *Southern Railway*, 236 U. S. 115. In *Smolik* v. *Philadelphia & Reading Coal & Iron Co.*, 222 Fed. 148, approved in *Penna. Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U. S. 93, the fact that a foreign corporation did business within a State was held to subject it to jurisdiction on the ground of reasonableness. But in the case at bar we have the instance of a designated agent.

From the Record it does not appear whether the designation was made prior to 1913 or subsequent thereto. If made prior to 1913 the laws of New York provided that a foreign corporation might be sued where the cause of action arose within the State. *Code of Civil Procedure*, § 1780. This cause of action did not arise within the State. If made subsequent to 1913 the laws of New York provide that a foreign corporation may be sued if doing business within the State. *General Corporation Law*, §§ 46 and 47. It has been held this is discretionary jurisdiction. See *Gregonis* v. *Phila. & Reading Coal & Iron Co.*, *supra*.

This consent, therefore, if we adopt the consent theory of jurisdiction, as we must in the circumstances, is extremely limited, under the statutes, in case of suit by nonresident. It cannot be said that respondent has consented to more than discretionary exercise of jurisdiction, and we see excellent reasons for a refusal to exercise jurisdiction.

(e) To treat this case as one of compulsory jurisdiction would impair the obligation of the contract between the respondent and the State of New York, in violation of Article I, § 10, par. 1 of the Constitution.

"We are construing a contract." *Bagdon* v. *Philadelphia & Reading Coal & Iron Co., supra.* The consent of the respondent should be limited to the statutes in force at the time such consent is given. If given prior to 1913 no action could be brought unless it arose within the State. If given subsequent to 1913 the jurisdiction is discretionary. The imposition of further conditions cannot be made. *Erie Railroad* v. *Pennsylvania*, 153 U. S. 628.

(f) Petitioner's argument as to alleged violation of Article IV, § 2 of the Constitution is invalid.

Petitioner's Brief (p. 15) says that the New York courts grant to plaintiffs the absolute right to sue whether citizens of New York, residents of New York, or aliens resident in New York. This must make it clear, granting the above statement, that New York does not discriminate against citizens of other States but for absolute right to sue requires that plaintiff shall be a citizen or a resident of New York. There is no doubt that if a person is born

or naturalized in the United States, and subject to the jurisdiction thereof, and resides in New York at the time of birth or naturalization, he is a citizen of New York. It does not follow that a resident of New York, aside from an alien, is a citizen of the United States and a citizen of New York, as alleged on page 15 of petitioner's Brief.

Petitioner seeks to distinguish *Chambers* v. *B. & O. R. R. Co., supra*, on the ground that at common law there is no cause of action for death, and that the Ohio statute provided such an action could be brought in Ohio only for the death of a citizen of Ohio, but petitioner forgets that the action arose under the Pennsylvania statute and Ohio discriminated against the widow of the deceased on the basis of her husband's citizenship.

CONCLUSION

We respectfully submit that the judgment should be affirmed.

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Supreme Court of the United States

CHARLES L. DOUGLAS,
Petitioner,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

BRIEF OF RESPONDENT, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, ON REARGUMENT.

Opinions of the Courts Below

The Special Term of the Supreme Court of the State of New York rendered the following unreported opinion:

> "The Court of Appeals in the *Murnan* case (246 N. Y. 244) has settled the question as to the discretionary power of the Supreme Court at Special Term to grant this motion, and I think that that discretion should be so exercised as to relieve the Courts of this State of the burden of cases that arise in another state and in which none of the parties is a resident of this State. Motion granted" (R., 16, 17).

The Appellate Division of the Supreme Court, Second Department, affirmed the order of Special Term, but wrote no opinion. 223 App. Div. 782 (R., 18).

The Court of Appeals, on May 29th, 1928, in 248 N. Y. 580, rendered the following memorandum opinion:

> "Judgment affirmed, with costs, on authority of *Murnan* v. *Wabash Railway Co.*, 246 N. Y. 244."

Jurisdiction of This Court

The judgment sought to be reviewed is dated May 29th, 1928 (R., 1, 2). The present petition was filed in this Court on July 26th, 1928.

The service of the summons and complaint was vacated and the action dismissed at Special Term (R., 4, 5). This order was unanimously affirmed by the Appellate Division of the Supreme Court (R., 18). The Court of Appeals affirmed the judgment entered upon the order (R., 1, 2).

The authority for the decision in the present case, as expressed in the opinions of the Special Term and the Court of Appeals, is *Murnan* v. *Wabash Railway Co., supra,* which held that the courts of New York are invested with discretion to decline jurisdiction of an action brought under the Federal Employers' Liability Act by a non-resident of the State of New York against a foreign railroad corporation, doing business in the State of New York at the time of the commencement of the action; and also that the motion of the defendant Railway Company for an order vacating the service of the summons and complaint and dismissing the action should not have been granted as a matter of law.

Statement of the Case

The plaintiff-petitioner brought this action to recover for injuries received on December 1st, 1927, while in the

defendant-respondent's employ in its railroad yards at Waterbury, Connecticut. The complaint alleges that the plaintiff and defendant were engaged in interstate commerce; that the defendant is a foreign Connecticut State railroad common carrier corporation (R., 8, 9). Plaintiff was a resident of Waterbury, Connecticut, at the time of the injury and at the time of the institution of the suit (R., 10). He was and is a citizen of the United States, and a citizen and resident of the State of Connecticut (R., 17).

The summons and complaint were served upon the defendant-respondent in the City of New York, on December 22nd, 1927 (R., 2). The service was made on Frank E. Hall, assistant-treasurer, and the person designated upon whom service of process may be made (R., 6, 7, 9).

The respondent is organized under and by virtue of the laws of the State of Connecticut, is authorized to do business in the State of New York, and was and is engaged in interstate commerce. It is a railroad corporation. It applied for and received a certificate to do business in New York from the Secretary of State as provided by the General Corporation Law of New York (R., 7).

In its motion to dismiss the complaint the respondent urged that it would be unnecessarily burdensome to try this case in New York and that petitioner would be more conveniently served by trial in Connecticut, where he resided, and where the accident took place (R., 7, 8). The respondent moved for an order vacating the service of the summons and complaint and dismissing the action on the ground that the cause of action having accrued wholly without the State of New York and the parties being non-resi-

dents, the jurisdiction of the court was wholly discretionary; that the court should, in the exercise of its discretion, decline to retain jurisdiction thereof; that § 47, Subdivision 4, of the General Corporation Law of New York is invalid under the commerce clause of the Federal Constitution in so far as it permits the court to assert jurisdiction; that both that section and the action constitute an unjust burden on interstate commerce (R., 5).

ARGUMENT

POINT I

The Order and Judgment do not violate § 2 of Article IV of the Constitution of the United States.

(a) The New York statutory situation.

In 2 Revised Statutes, Part 3, Chapter 8, Title 4, Article I, Section 15, we find the following provision:

> "Suits brought in the Supreme Court by residents of this state against any corporation created by or under the laws of any other state, government or country, for the recovery of any debt or damages, may be commenced by attachment."

This was the first legislation authorizing a proceeding in rem against a foreign corporation, and then such proceeding could only be instituted by a resident of the State.

Chapter 107 of the Laws of 1849 read as follows:

> "§ 1. Section fifteen, article one, title four, chapter eight, part third, of the Revised Statutes, is hereby amended so as to read as follows:

"§ 15. Suits may be brought (in the supreme court, in the superior court of the city of New York, and in the court of common pleas in and for the city and county of New York) against any corporation, created by or under the laws of any other state government or country, for the recovery of any debt or damages, whether liquidated or not, arising upon contract made, executed or delivered, within this state, or upon any cause of action arising therein, such suits may be commenced by complaint and summons together with an attachment, as now provided by law, and such complaint and summons may be served as provided by sections one hundred and thirteen, and one hundred and fourteen of the code of procedure."

Chapter 438 of the Laws of 1849 contained the following provision:

"§ 427. An action against a corporation, created by or under the laws of any other state, government, or country, may be brought in the supreme court, the superior court of the city of New York, or the court of common pleas for the city and county of New York, in the following cases:

"1. By a resident of this state, for any cause of action;

"2. By a plaintiff not a resident of this state, when the cause of action shall have arisen, or the subject of the action shall be situated within this state."

Code of Civil Procedure, Section 1780 (1876), read as follows:

"An action against a foreign corporation may be maintained by a resident of the State or by a domestic corporation for any cause of action. An action

against a foreign corporation may be maintained by another foreign corporation or by a non-resident, in one of the following cases only:

"1. Where the action is brought to recover damages for the breach of a contract made within the State, or relating to property situated within the State, at the time of the making thereof.

"2. Where it is brought to recover real property situated within the State, or a chattel, which is replevied within the State.

"3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State."

By an amendment (Chap. 60, Laws of 1913) a fourth provision was added:

"4. Where a foreign corporation is doing business within this state."

Chapter 916 of the Laws of 1920, entitled "An Act to amend the general corporation law, in relation to actions by and against foreign corporations," effective May 21, 1920, reads in part as follows:

"§ 46. Action against foreign corporation. An action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action.

"§ 47. *Action against foreign corporation by* another foreign corporation or *non-resident. An action against a foreign corporation may be maintained* by another foreign corporation, or *by a non-resident, in one of the following cases only:*

"1. Where the action is brought to recover dam-

ages for the breach of a contract made within the state, or relating to property situated within the state, at the time of the making thereof.

"2. Where it is brought to recover real property situated within the state, or a chattel, which is replevied within the state.

"3. Where the cause of action arose within the state, except where the object of the action is to affect the title to real property situated without the state.

"4. *Where a foreign corporation is doing business within this state.*

"Within the meaning of this section, a foreign corporation shall not include a corporation located in this state and created by or under the laws of the United States" (Italics ours).

The above became §§ 46 and 47 of the General Corporation Law, and represents the present statutory situation.

Until 1849 there was no statutory provision for suit by a non-resident against a foreign corporation, and by statute a resident could sue a foreign corporation only by way of attachment. In 1849 a suit could be brought by a non-resident against a foreign corporation when the cause of action arose or the subject of the action was situated within the State, but a resident could sue on any cause of action. The statutes passed in 1849 did not define all cases so the courts still had their general jurisdiction by which any plaintiff could sue a foreign corporation for any cause of action provided jurisdiction could be obtained of the corporation. When Section 1780 of the Code of Civil Procedure was enacted, in 1876, as a result of *McCormick* v. *Pennsyl-*

vania R. R. Co., 49 N. Y. 303 (1872), an action by a non-resident against a foreign corporation could be maintained only in the cases specified. "The jurisdiction of the courts is defined and limited and absolutely confined to the cases specified, * * *." *Robinson* v. *Oceanic Steam Nav. Co.*, 112 N. Y. 315, 323 (1889). This policy was expressly recognized in *Barrow Steamship Company* v. *Kane*, 170 U. S. 100, 110, 112, 113, and the statute was also discussed in *Anglo-American Provision Co.* v. *Davis Provision Co.*, 191 U. S. 373. Between 1876 and 1913 the New York courts did not have jurisdiction of actions where plaintiff was a non-resident, defendant a foreign corporation, and the cause of action was based upon a tort committed in another State. From 1913 to date the jurisdiction has been discretionary. Thus foreign corporations are now treated as non-resident individuals have long been treated.

Petitioner's Brief (pp. 10-13) refers to some seven cases where the Supreme Court of the State of New York entertained actions in tort brought by residents of New York against foreign corporations. The opinions in those cases do not discuss the question with which we are here concerned, and the defendants did not raise any jurisdictional point. *Flynn* v. *Central Railroad Company of New Jersey*, 142 N. Y. 439 (Petitioner's Brief, pp. 13-15), is in line with our statement above, that under the common law any plaintiff could sue a foreign corporation for any cause of action provided jurisdiction could be obtained of the corporation. We find Petitioner agrees to this (bottom of p. 17, top of p. 18).

(b) What is the right of a resident of New York?

Under § 46 of the General Corporation Law of New

York an action *may* be maintained against a foreign corporation for any cause of action. It is true that in *Gregonis* v. *P. & R. Coal & Iron Co.*, 235 N. Y. 152, 159, the opinion contains a dictum that a selection between resident plaintiffs—opening the courts to one and closing them to the other—would probably run counter to the United States Constitution. "Yet in denying the existence of a power to decline jurisdiction in the case of residents the court acted, it is submitted, without any convincing justification." We agree with the above statement by Mr. Paxton Blair in an article entitled "The Doctrine of Forum Non Conveniens," Columbia Law Review, Volume XXIX, No. 1, p. 13 (Jan., 1929).

In *Pietraroia* v. *N. J. & H. R. R. & F. Co.*, 197 N. Y. 434, the plaintiff, a resident of New York, received letters of administration and brought suit against a New Jersey corporation on account of an accident in New Jersey resulting in fatal injuries to plaintiff's deceased. The Appellate Division exercised its discretion in refusing to entertain jurisdiction of the plaintiff's action, and the Court of Appeals said that the Appellate Division undoubtedly possessed this discretionary power. The Court of Appeals said:

> "It could well hold that the court was not bound to exercise jurisdiction, although the plaintiff was a resident, where, as Mr. Justice Ingraham says, in his opinion, 'those solely benefited are non-residents and where no reason exists why the liability cannot be enforced in the state where the parties reside and where the accident happened * * * but resort must be had to the laws of that state (New Jersey) to determine whether or not a cause of action exists.' (131 App. Div. 833.)" (P. 439.)

In *Chambers* v. *Baltimore & Ohio R. R.*, 207 U. S. 142, Mr. Justice Holmes said at page 151:

> "I do not think that it can be presumed to mean to give to all persons a right to sue in case the Constitution forbids it to make the more limited grant that it attempts."

If the Constitution says in effect that the New York resident must be treated exactly as the Connecticut resident, as to the right to bring suit in New York courts, and if the general grant, without qualification, is unconstitutionally limited to a resident plaintiff, it cannot be presumed to give to a non-resident the full unqualified grant.

Both § 46 and § 47 of the General Corporation Law of New York contain the word "may," but the opinion in *Gregonis* v. *Phila. & Reading Coal & Iron Co., supra,* says that the courts have never refused to entertain jurisdiction over a foreign corporation in behalf of a resident for a transitory cause of action such as contract and tort cases arising outside of the State. This is somewhat negatived by *Pietraroia* v. *New Jersey & Hudson River Ry. & F. Co., supra,* at p. 439, but is in line with *Palmer* v. *Phoenix Mut. L. Ins. Co.*, 84 N. Y. 63, 67 (1881); *Grant* v. *Cananea Con. Copper Co.*, 189 N. Y. 241, 247, 248 (1907) and *McCauley* v. *Georgia Railroad Bank*, 239 N. Y. 514 (1924).

While there is no statutory or constitutional reason, we submit, why this should be so, this is the situation as it obtains in New York State at the present time. The opinion in *Gregonis* v. *Phila. & Reading Coal & Iron Co., supra,* admits rejection of litigation even by residents where it is futile and useless to assume jurisdiction (p. 160). There is some indication that if plaintiff had been a citizen jurisdic-

tion would be compulsory, but this is dictum, and throughout emphasis is laid upon residence (p. 159). A further limitation of the broad ruling of *Gregonis* v. *Phila. & Reading Coal & Iron Co., supra,* is made in *Swift & Co.* v. *Obcanska Zalozna V. Karline,* 245 N. Y. 570 (1927), holding the Court did not have jurisdiction of an action brought by a foreign corporation which had obtained permission to do business in New York and was doing business there, the action being to recover for money had and received against a foreign corporation not doing business in the State, the cause of action not arising in the State and not concerning property there.

(c) What is the right of a citizen of New York?

In this connection we quote below at some length the opinion in *Adams* v. *Penn Bank of Pittsburgh,* 35 Hun 393, General Term of the Supreme Court of New York (1885):

> "Section 1780 of the Code of Civil Procedure, which is controlling of the cases in which actions may be maintained in the courts of this State against foreign corporations, does not permit such an action by a non-resident, except in certain specified cases, neither of which exists in this action. The plaintiff being a resident may be presumed to be a citizen of the State of Pennsylvania, although that fact is not affirmatively shown. But, assuming him to be such, he is entitled to all the privileges and immunities secured to citizens of the United States, and of the several States, by the Constitution of the United States. But those provisions do not secure to citizens of any State the right to exercise in another State, privileges and immunities which are not conferred upon citizens of that State. For instance, the plaintiff does not by virtue of any provision of the

Constitution of the United States possess the right to maintain an action against the defendant in this State, because he might maintain such an action in the State of Pennsylvania. The privileges and immunities that he can claim in this State under the Constitution are only such as pertain to citizens of this State by reason of their citizenship. In order, therefore, to entitle him to maintain his action against a foreign corporation, notwithstanding the provisions of the Code to the contrary, he must be able to show that a citizen of this State circumstanced precisely as he is, could maintain such an action. *But it is manifest that under section 1780 the right to maintain the action does not depend upon citizenship, but upon residence; and a citizen of this State who actually resides in the State of Pennsylvania cannot by reason of his citizenship sue a corporation of Pennsylvania in our courts, except in one of the cases specifically declared by statute.* As the question is wholly controlled by residence, it necessarily follows that a resident of another State cannot come into our courts and insist upon maintaining an action against a foreign corporation, except only in cases allowed by our statute. The plaintiff, therefore, fails to show any right to maintain his action against the defendant, and consequently is not entitled to hold the attachment which he has sued out" (pp. 394, 395). (Italics ours.)

We find the case of *Adams* v. *Penn Bank of Pittsburgh, supra*, decided in 1885, cited in *Robinson* v. *Oceanic Steam Nav. Co., supra*, at page 324, decided in 1889, and set out again in *Klotz* v. *Angle*, 220 N. Y. 347, at page 358, decided in 1917. The case of *Robinson* v. *Oceanic Steam Nav. Co., supra*, is quoted in *Canadian Northern Ry.* v. *Eggen*, 252 U. S. 553, and referred to in *Barrow Steamship Co.* v. *Kane, supra*. *Adams* v. *Penn Bank of Pittsburgh* is one of the

very few cases which we have found in New York expressly dealing with the alleged right of a citizen of New York to bring suit in that State, and we think it completely answers one of the questions asked during the oral argument.

In *Duquesne Club* v. *Penn Bank of Pittsburgh*, 35 Hun 390, Davis, *P.J.*, said at page 393:

> "But if it were otherwise, and the plaintiff corporation is to be regarded as a citizen of Pennsylvania, it would not have the right to maintain this action in our courts, because the right to maintain such actions against foreign corporations is not one under our law that pertains to citizenship, but is a right pertaining only to residence. *A citizen of our State who is not a resident of the State, could not maintain the action under section 1780 of the Code, and therefore a citizen of another State, who is not a resident of this State, is equally denied the right to maintain such an action.* There is nothing, therefore, we think, at all in conflict with any of the provisions of the Constitution of the United States in our statutory enactments controlling this class of cases. As the action cannot be maintained it necessarily follows, therefore, that the right of attachment cannot be upheld" (Italics ours).

In line with these two opinions is *Frost* v. *Brisbin*, 19 Wend. 11 (1837).

(d) The so-called discrimination is not between citizens and non-citizens, but between residents and non-residents.

Robinson v. *Oceanic Steam Nav. Co., supra*, referring to Section 1780 of the Code, said:

> "This section makes no discrimination between citizens, but between residents and non-residents" (p. 324).

In *Johnson* v. *Victoria Chief Copper Mining & S. Co.*, 150 App. Div. 653 (1912), plaintiff was a resident of Kentucky; defendant was located in the Territory of New Mexico. This was an action for an accounting in relation to a partnership for the development of mines in a foreign territory. The opinion reads in part:

> "Under these conditions the provisions of section 1780 of the Code of Civil Procedure are applicable, for the cause of action in question does not come within any one of the classes of cases in which a non-resident may maintain an action against a foreign corporation in the courts of this State. In *Robinson* v. *Oceanic Steam Navigation Company* (112 N. Y. 315) this section was held not to violate the provisions of the Constitution of the United States, for the reason that it made no discrimination between citizens of various States, but only between residents and non-residents" (p. 654).

It has been the unanimous opinion of the Court of Appeals that § 1780 of the Code did not conflict with any provision of the Federal Constitution or with the Federal authorities upon the subject. *Grant* v. *Cananea Con. Copper Co., supra.* See also *Fairclough* v. *Southern Pac. Co., et al.*, 171 App. Div. 496, affirmed in 219 N. Y. 657 on authority of *Robinson* v. *Oceanic Steam Navigation Co., supra,* and *Klotz* v. *Angle, supra.*

Steigleder v. *McQuesten*, 198 U. S. 141, points out that it has long been settled that residence and citizenship are wholly different things within the meaning of the Con-

stitution. A person can be a citizen of New York and a resident of Connecticut, and a person can be a citizen of Connecticut and a resident of New York. "But it has long been settled that residence and citizenship were wholly different things within the meaning of the Constitution * * *" (p. 143).

In *LaTourette* v. *McMaster*, 248 U. S. 465, this court adopted the state court interpretation of a state statute, distinguishing between citizen and resident. It was argued that the right to pursue a lawful business was the privilege of a citizen (p. 469). LaTourette could not comply with the residence section of the South Carolina law as he was a resident and citizen of New York, and the case holds that discrimination against non-residents is not necessarily unconstitutional and may often be justified as reasonable.

In *Maxwell* v. *Bugbee*, 250 U. S. 525, this court recognized in a tax case that the difference in the method of taxation rested upon residence and not upon citizenship, and consequently there was no unconstitutional discrimination. In *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60, New York discriminated against all non-residents with no reasonable ground for diversity of treatment, but this court again pointed out that the terms "resident" and "citizen" were not synonymous.

In *Canadian N. Ry. Co. v. Eggen, supra*, a resident of South Dakota, injured in Canada, sued in Minnesota, and the court applied the one year statute of Canada. If plaintiff had been a citizen of Minnesota a different statute of limitations would have applied. It will be recalled that it was in this case that this court cited with approval

Robinson v. *Oceanic Steam Nav. Co., supra. Chemung Canal Bank* v. *Lowery,* 93 U. S. 72, also involved a statute of limitations. In *Canadian Northern Ry. Co.* v. *Eggen, supra,* petitioner argued that the power to classify exists; that the difference in right or privilege resulting from classification is not objectionable provided the classification has a reasonable basis; that the differences upon which the classification is based need not be great or conspicuous; either logically appropriate or scientifically accurate. In that case the statute contained the word citizenship whereas in the case here we have involved the word residence, and seek to give it a natural meaning different from citizenship. It "must be taken in the sense which best harmonizes with the subject matter in reference to which it is used." *Union Hotel Company* v. *Hersee,* 79 N. Y. 454, 461.

Please see also *Cummings* v. *Wingo,* 31 S. C. 427; *Central R. R. Co.* v. *Georgia, etc., Co.,* 32 S. C. 319; *Loftus* v. *Pennsylvania R. Co.,* 107 Ohio St. 352, dismissed by stipulation in 266 U. S. 639, discussed at length under Point II. The Ohio statute went farther than the one here involved, allowing no consideration of reasonableness.

The Fourteenth Amendment does not make a resident in a State a citizen of such State unless he intends by residence therein to become a citizen. *Sharon* v. *Hill,* 26 Fed. 337, 344. "No length of residence, without the intention of remaining, constitutes domicile." *Penfield* v. *Chesapeake & cc. R'd Co.,* 134 U. S. 351, 356.

Such legislation as we find in New York, covering a long period of time, more drastic in its early stages than now, should not be overruled unless necessarily incompatible with the supreme law of the land. *Field* v. *Clark,* 143 U. S.

649, 691. Mr. Justice Clark, writing the opinion of this Court in *Canadian Northern Ry. Co.* v. *Eggen, supra,* quoted from *Robinson* v. *Oceanic Steam Nav. Co., supra,* as follows:

> "A construction of the constitutional limitation (the one we are considering) which would apply it to such a case as this would strike down a large body of laws which have existed in all the states from the foundation of the government, making some discrimination between residents and non-residents in legal proceedings and other matters" (p. 553).

Objection has been made to the claimed distinction by reason of Amendment 14, § 1, of the Constitution, but the protection afforded relates to "privileges and immunities of citizens of the United States • • •."

To adopt the distinction made by New York of its own statute all doubt of its constitutionality vanishes and we follow the general rule to uphold an act if possible.

We do not lose sight of the significance of *Blake* v. *McClung,* 172 U. S. 239, which held that Tennessee could not by statute give her citizens preference over the citizens of other States in the assets of a foreign corporation though the statute granting the preference used the word "resident" rather than the word "citizen." This court threw overboard the state distinction in view of the purpose and scope of the statute, saying that the words "residents of any other country or countries" were used in the sense of domicile and hence citizenship. But the manifest purpose and scope were different from those in the case at bar where residence does not appertain to or inhere in citizenship. The opinion recognizes the fact that one may be a citizen

of one State and a resident of another. This case is quoted in *Canadian Northern Ry. Co.* v. *Eggen, supra,* to the effect that certain regulations of the internal affairs of the State cannot reasonably be characterized as hostile to the fundamental rights of citizens of other States (pp. 561, 562).

(e) A discrimination is not unconstitutional, even as between citizens of different States, if there is a reasonable ground for the diversity of treatment.

(1) *The constitutional question does not arise in this case because of the circumstances.*

There are several dicta by this court to the effect that there is a constitutional right to sue but we urge that this constitutional right or privilege does not arise in this case by reason of the circumstances. Certain conclusions can be drawn from *Chambers* v. *Baltimore & Ohio R. R. Co., supra.* This court affirmed the judgment of the State Supreme Court which set aside a verdict and judgment for the plaintiff and dismissed the complaint. No unconstitutional discrimination was shown because the statute made the citizenship of the deceased, not that of the plaintiff, the test. We conclude from the opinion in this case that if a citizen of one State is allowed to sue and a non-citizen is not allowed, on a cause of action created by the law of the place of suit, the statute is unconstitutional. That, we think, is as far as this court has gone and even that was unnecessary to the particular decision. The opinion says:

> "But, subject to the restrictions of the Federal Constitution, the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them" (p. 148).

Our investigation does not disclose a holding by this court of a constitutional right in a non-resident to sue another non-resident upon a cause of action arising outside the state. This phase of the problem may be put in the language used by Mr. Paxton Blair in his article entitled "The Doctrine of Forum Non Conveniens in Anglo-American Law," Columbia Law Review, Vol. XXIX, page 18:

> "It would be uncandid to purport to find in the decisions of the United States Supreme Court which we have discussed anything but negative results. But even negative results may serve as a basis for generalizations; and the ultimate truth, when revealed, will probably not be inconsistent with these two propositions: (1) the constitutional right of a non-resident to sue has never been held by the Supreme Court to embrace a right to sue another non-resident upon a cause of action arising outside the state and governed not by the *lex fori* but by the *lex loci;* (2) the decisions or dicta recognizing in a non-resident *some* right to sue are confined in their scope to situations where there has been some nexus with the forum."

From the decisions of this court it would appear there was no constitutional right in this petitioner, a resident and citizen of Connecticut, to sue in New York the defendant, a Connecticut corporation, on a tort committed in Connecticut, the cause of action arising out of the Federal Employers' Liability Act, a part of the statutory law of Connecticut as much as of the statutory law of New York. The cause of action did not arise in New York out of business done by the defendant therein. The immaterial fact that the defendant was doing some business in New York can hardly serve as the basis for the invocation by petitioner of a constitutional privilege.

The discrimination is not directed against plaintiff be cause he is a non-resident. He may not sue if 1) he is non-resident, 2) defendant is a foreign corporation al though doing business in New York, 3) the action is in tort, 4) committed outside of New York, 5) New York is no more convenient than Connecticut, 6) no practical reason exist for suit in New York. Non-residents are capable o separate identification from residents by facts and cir cumstances other than that they are non-residents. Thi goes further than is required for permissive classificatio (please see language of opinion of Mr. Justice White, i *Central Loan & Trust Co.* v. *Campbell*, 173 U. S. 84, at p 98).

That residence is not the sole basis for classificatio appears from the treatment of contract cases which ar almost invariably entertained. Subdivisions 1, 2 and 3 o § 47 of the General Corporation Law show legitimate at tempts to discriminate on account of the character of th cause of action rather than of the plaintiff.

They look to the subject matter rather than to the ca pacity of the plaintiff to sue.

(2) *"Practical justifications."*

There was involved in *LaTourette* v. *McMaster*, *supr* an act of South Carolina providing for the licensing o insurance brokers. Only such persons as were resident of the State could be licensed. LaTourette was a reside and citizen of New York, and could not comply with thi requirement. It was pointed out that the character of th business of insurance was clothed with a public intere

and subject, therefore, to the regulating power of the State. This court agreed that one of the privileges of a citizen is to pursue any lawful business or vocation. This court said that it must accept the interpretation of the statute given by the Supreme Court of the State. The Supreme Court of the State declared there was no discrimination on account of citizenship, the discrimination resting alone on residence in the State. In conclusion this court said:

> "In other words, it is the effect of the statute that its requirement applies as well to citizens of the State of South Carolina as to citizens of other States, residence and citizenship being different things" (p. 470).

This case is authority for the proposition that the discrimination under the New York Statute is not between citizens and non-citizens, but between residents and non-residents, which we have discussed under Point I (d). But the case is also authority for the proposition that discrimination may be made if we have "practical justifications."

No section of the Constitution defines the privileges and immunities of citizens. *Minor* v. *Happersett*, 21 Wall. 162, 170. As early as 1876 it was held in *Chemung Canal Bank* v. *Lowery, supra*, that a provision to the effect that when the defendant is out of the State, the statute of limitations shall not run against the plaintiff if the latter resides in the State, but shall if he resides out of the State, is not repugnant to the second section of the fourth article of the Constitution of the United States. The opinion says there was a valid reason for the discrimination, the statute was equitable and just. The court took into consideration a personal obligation due at the domicile of the obligee.

In *McCready* v. *Virginia*, 94 U. S. 391, Virginia prohibited the citizens of other States from planting oysters in Ware River. This was held not to be a privilege of a citizen of another State. The citizens of Virginia owned the property, not by virtue of citizenship merely, but by virtue of citizenship and domicile united, a citizenship confined to that particular locality, says the opinion. This court has not attempted to define the word "privileges." There is some intimation in the opinion that it relates to a right of general not of special citizenship.

The process of attachment may be allowed against a non-resident and not against a resident. A bond may be required as a prerequisite to the issue of an attachment against a resident and not be required in the case of a non-resident. *Central Loan & Trust Co.* v. *Campbell, supra.*

This court considered the system of taxation prevailing in Connecticut in *Travellers' Ins. Co.* v. *Connecticut*, 185 U. S. 364. It was held "that mere inequality in the results of a State tax is not sufficient to invalidate it." *Ballard* v. *Hunter*, 204 U. S. 241, held that a State may make reasonable discrimination in regard to service of process between residents and non-residents. In *Heim* v. *McCall*, 239 U. S. 175, it was held that New York could provide by statute for preference to citizens of that State on public works without a violation of the privilege clause of the Constitution. In another connection we have discussed *La-Tourette* v. *McMaster*. The legislation involved was passed in the exercise of a power of government, had relation to that power, and the opinion discusses the motive of the statute. We have also considered *Canadian Northern Ry. Co.* v. *Eggen*, and the test of reasonableness. *Ferry* v.

Spokane P. & S. Ry. Co., 258 U. S. 314, held that dower was not a privilege or immunity of citizenship. Here we have a declaration of further limitation of the word "privileges." The discrimination has a reasonable support in fact and is laid on other suitors in like situations. Please see *Kentucky Co.* v. *Paramount Exch.*, 262 U. S. 544, at p. 551. We have in the case at bar no hostile discrimination against non-residents. "Literal and precise equality in respect of this matter is not attainable; it is not required." *Hess* v. *Pawlowski*, 274 U. S. 352, at p. 356. And throughout all this we see procedural remedies often become substantial rights, making these cases most persuasive.

(3) *New York's judicial policy in the treatment of non-residents is reasonable.*

There are certain outstanding cases in New York to which we first wish to call attention.

In *Robinson* v. *Oceanic Steam Nav. Co., supra,* the plaintiff, as administrator, commenced an action in New York to recover damages against the defendant, a foreign corporation, for negligently causing the death of his intestate. The death occurred upon the ocean within the territorial limits of the United Kingdom of Great Britain and Ireland. Under the statute then in force an action could not be maintained by a non-resident plaintiff against a foreign corporation for a cause of action which arose outside of the state limits. The opinion says:

> "The discrimination between resident and non-resident plaintiffs is probably based upon reasons of public policy, that our courts should not be vexed

with litigations between non-resident parties over causes of action which arose outside of our territorial limits. Every rule of comity and of natural justice and of convenience is satisfied by giving redress in our courts to non-resident litigants when the cause of action arose, or the subject-matter of the litigation is situated within this state" (pp. 323, 324).

The Court of Appeals said in *Hoes* v. *N. Y., N. H. & H. R. R. Co.*, 173 N. Y. 435 (1903), at page 441:

> "Is it possible, by a device so simple and transparent as the one here disclosed, to confer upon the Supreme Court of this state jurisdiction to try a negligence action having its origin in the state of Connecticut and between a corporation and residents of that state?
>
> "If this can be done it will open wide the floodgates of litigation in similar cases, establish a new legal industry and impose thereby upon our already overworked courts the obligation to try actions imported from a foreign jurisdiction."

Although the questions involved were different from those in the case at bar the opinion of the Court of Appeals in *Hunter* v. *Mutual Reserve L. Ins. Co.*, 184 N. Y. 136 (1906), at pages 144 and 145, is significant:

> "It would be quite beyond the spirit of those decisions to hold and we cannot believe that it was the further policy of such legislation to create and perpetuate a local forum to which under guise of an assignment to some resident, non-residents of far distant states might flock for the purpose of instituting litigation upon contracts issued to them at their homes, against a corporation there readily subject to service and which long before had attempted in good faith to withdraw from the jurisdiction thus hunted out."

This paragraph is quoted in the opinion of this court in 218 U. S. 573, at page 588, affirming *Hunter* v. *Mutual Reserve L. Ins. Co., supra.*

In *Pietraroia* v. *N. J. & H. R. R. & F. Co., supra,* the Court of Appeals held that New York was not bound to exercise jurisdiction in an action on a foreign tort against a foreign corporation, although the plaintiff was a resident. The opinion says:

> "As a question of policy, it is intolerable that our courts should be impeded in their administration of justice, and that the people of the state should be burdened with expense, in redressing wrongs committed in another state, for the benefit, solely, of its citizens, and where the remedy is in the enforcement of its statutes" (p. 439).

The Court of Appeals in *Waisikoski* v. *P. & R. Coal & Iron Co.,* 228 N. Y. 581 (1920), affirmed the judgment of the Appellate Division on the opinion of Jenks, *P.J.,* in 173 App. Div. 538. Plaintiff resided in Pennsylvania, defendant was a Pennsylvania corporation, doing business in New York. The action was brought to recover damages for personal injuries sustained by plaintiff while employed by defendant in Pennsylvania. It was held that under Subdivision 4 of § 1780 of the Code of Civil Procedure the court had discretionary jurisdiction. The opinion in the Appellate Division says:

> "It seems but just that the Legislature should not confer the absolute right to institute a litigation of this character in our courts, beyond the discretion of the court to refuse to entertain it. Aside from the question of legislative power, I do not read the statute as thus absolute, but I think that the discre-

tion to entertain or to refuse such an action as discussed and declared in *Pietraroia's* case, *supra*, still exists. See, too, *Zeikus* v. *Florida East Coast Railway Co.*, 144 App. Div. 91, 128 N. Y. Supp. 933. The expression of the statute that such an action 'may be maintained' is not to be construed as mandatory upon the court. *Talmage* v. *Third Nat. Bank of City of N. Y.*, 91 N. Y. 531-537. See, too, *People ex rel. Comstock* v. *City of Syracuse*, 59 Hun, at page 260, 12 N. Y. Supp. 890, affirmed 128 N. Y. 632, 29 N. E. 146."

In *Gregonis* v. *P. & R. Coal & Iron Co.*, *supra*, the Court of Appeals said:

"On the other hand, by a long line of authorities the courts have repeatedly refused in their discretion to entertain jurisdiction over causes of action arising out of a tort committed in a foreign state, where both the plaintiff and the defendant were *non-residents*. (*Pietraroia* v. *New Jersey & Hudson R. Ry. & F. Co.*, 197 N. Y. 434; *Hoes* v. *N. Y., N. H. & H. R. R. Co.*, 173 N. Y. 435; *Hutchinson* v. *Ward*, 192 N. Y. 375; *Collard* v. *Beach*, 81 App. Div. 582; *Zeikus* v. *Florida East Coast R. R. Co.*, 144 App. Div. 91.) The reason for this exception is stated in the cases, and the rule has been too firmly imbedded in our jurisprudence to justify modification without legislative action. The courts also have been obliged to reject litigation even by residents where it was futile and useless to assume jurisdiction. This has been called lack of jurisdiction over the subject-matter. Thus, one state will not give effect to rights arising under the penal laws of another state (*Raisor* v. *C. & A. R. Co.*, 215 Ill. 47), nor enforce or regulate the internal workings of a foreign corporation (*Marshall* v. *Sherman*, 148 N. Y. 9; *Post & Co.* v. *Toledo, C. & St. L. R. R. Co.*, 144 Mass. 341, p. 345), nor entertain actions which relate directly to real property

situated in a foreign state. (*Alger* v. *Alger*, 31 Hun 471.) Neither will it enforce a foreign law which conflicts with its own settled policy or is adverse to principles of abstract justice. (*Loucks* v. *Standard Oil Co., supra.*) It may be also that the courts of this state will not feel inclined to take jurisdiction where a right is given by a foreign statute which provides an exclusive remedy to be enforced in a particular way or before a special tribunal. (*Coyne* v. *Southern Pacific Co.*, 155 Fed. Rep. 683; *Southern Pacific Company* v. *Dusablon*, 48 Tex. Civ. App. 203; *Hutchinson* v. *Ward*, 192 N. Y. 375.) The court here, however, has both jurisdiction of the parties and of the subject-matter" (pp. 160, 161).

The judgment in the case at bar was affirmed on the authority of *Murnan* v. *Wabash Railway Co., supra*, and the Court of Appeals in the latter case said:

"Although the rule prohibits a court of general jurisdiction from refusing to exercise its jurisdiction in its discretion, it has often been held that the courts of this State may refuse in their discretion to entertain jurisdiction over causes of action arising out of a tort committed in a sister State where both the plaintiff and defendant are non-residents. (*Gregonis* v. *P. & R. Coal & Iron Co.*, 235 N. Y. 152, 160, and cases cited.) While no controlling reason compelled, the Special Term refused to assume jurisdiction; it refused, it would seem, for reasons of convenience, to hear the case and vacated the service of the summons under the authorities referred to" (pp. 246, 247).

The case went back to the Appellate Division which decided to entertain jurisdiction in view of the circumstances.

"Our courts are not supported by the people for any such purpose." *Ferguson* v. *Neilson*, 33 N. Y. St. Repr. 814.

The witnesses would have to be brought into New York. *Zeikus* v. *Florida East Coast Railway Co.*, 144 App. Div. 91 (1911). To exercise discretionary jurisdiction has become a matter of public policy. *Payne* v. *New York, Susquehanna & W. R. R. Co.*, 157 App. Div. 302 (1913); *Colorado State Bank* v. *Gallagher*, 76 Hun 310 (1894). In *Collard* v. *Beach*, 81 App. Div. 582, 93 App. Div. 339, is this: " • • • the calendars of the courts of this State are congested • • • it would impose an undue burden upon the courts of our State if the practice were established of assuming jurisdiction in such cases" (pp. 340, 341). As parts of this problem we have the elements of expense, particularly expense of administration, congestion, taxation, maintenance of courts, delays of justice, availability of witnesses, convenience of forum.

Now § 47 of the General Corporation Law makes no distinction between causes of action based upon tort and those based upon contract but in contract cases the jurisdiction is usually entertained and in tort cases occasionally entertained depending upon the facts.

The following are tort cases entertained: *Murnan* v. *Wabash Railway Co., supra; Richter* v. *Chicago, R. I. & Pac. Ry.*, 123 Misc. 234 (1924); *Perinet* v. *Central Vt. Ry.*, 215 App. Div. 711 (1926). In contract cases the jurisdiction is usually entertained. *Smith* v. *Crocker*, 14 App. Div. 245 (1st Dept. 1897), *aff'd* without opinion, 162 N. Y. 600 (1900); *Furbush* v. *Nye*, 17 App. Div. 325 (1st Dept. 1897); *Belden* v. *Wilkinson*, 44 App. Div. 420 (1st Dept. 1899); *Wertheim* v. *Clergue*, 53 App. Div. 122 (1st Dept. 1900); *Stagg* v. *British Controlled Oilfields, Ltd.*, 117 Misc. 474 (1921); *Davis* v. *Kessler & Co.*, 118 Misc. 292 (1922);

Rodger v. *Bliss*, 130 Misc. 168 (1927); *Crane, Hayes & Co.* v. *N. Y., N. H. & H. R. R. Co.*, 131 Misc. 71 (1927); *Phillips & Sons* v. *Central of Ga. Ry.*, 243 N. Y. 650 (1926). Only in tort cases, arising outside of New York, between non-residents, do New York courts make it a rule to exercise a reasonable discretion, based upon all the circumstances. Mere non-residence is never controlling. Because of non-residence other circumstances may come in making reasonable the refusal of jurisdiction.

In connection with all this, as we pointed out on page 19 of our original brief, the record shows no fact objection to trial in Connecticut other than the allegation of powerful influence of respondent in Connecticut and that verdicts in that State are small and inadequate in cases for personal injury against this respondent (R., 13, 16). We have the broad ground of no necessity for both parties to litigate away from home, plaintiff can obtain jurisdiction over defendant in Connecticut where both parties reside, where the accident happened, where the defendant is incorporated, and where the witnesss are available. New York has not, on the one hand, committed an act of hostility, and has not, on the other hand, decided the case as a mere matter of convenience.

The physical position of New York City and counties adjoining makes the situation peculiarly pressing. Of the 9,444 cases filed in the Supreme Court, New York County, from March to December, 1927, 6,915, or over 73%, were for death, personal injury and loss of services growing out of accidents (See Message to the Legislature from Governor Alfred E. Smith relative to the congestion of the court calendars owing to the increasing number of motor vehicle

accidents, dated January 9th, 1928, Legislative Document No. 53, 1928).

(*f*) Because the exercise of jurisdiction would be a burden on interstate commerce, the refusal to exercise jurisdiction is at least reasonable, and, therefore, not a violation of § 2 of Article IV of the Constitution.

"Distinctions of degree must be made." *Diamond Glue Co.* v. *United States Glue Co.*, 187 U. S. 611, 616; *Anglo-Am. Prov. Co.* v. *Davis Prov. Co. No. 1, supra.* As applied to the respondent "we think the conditions are unreasonable and burdensome, and therefore in conflict with the commerce clause." *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197, 205. A foreign corporation which engages in interstate commerce is not immune from service of process in an action arising out of business transacted within the State, *International Harvester* v. *Kentucky*, 234 U. S. 579, but total exemption from suit is one thing, and unnecessary state regulation of interstate commerce is another thing.

In addition to the grounds already set forth applying to actions brought by non-residents against non-residents on account of foreign torts, because the defendant is a railroad common carrier engaged in interstate commerce we have present additional reasons why the refusal to exercise jurisdiction should be approved. In *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, the state statute was held to impose an unreasonable burden on interstate commerce and was void under the Commerce Clause. We do not need to go so far in the case at bar, but can approach the problem from the point of view of reasonableness.

During the period of federal control the Director General by Orders No. 18 and 18A required suit to be brought in the county or district where the cause of action arose or where the plaintiff resided at the time it accrued. The facts of our case would not satisfy the requirements of those orders, and Mr. Justice Brandeis in *Davis* v. *Farmers Co-operative Co., supra,* said:

> "The facts recited in the order, to justify its issue, are of general application, in time of peace as well as of war" (p. 316).

It was recognized in the opinion that claims for personal injuries and for loss and damage of freight are numerous; that this kind of litigation entails absence of employees from their customary occupation, which in time impairs efficiency in operation and causes heavy expense; that the public are interested in maintaining adequate, uninterrupted transportation service at reasonable cost; that the public is interested in the avoidance of waste, in interstate transportation; and that by requiring from interstate carriers general submission to suit, it unreasonably obstructs, and unduly burdens, interstate commerce.

(1) *Cases Holding Suit to be Burden on Interstate Commerce:*

In *Davis* v. *Farmers Co-operative Co., supra,* plaintiff and defendant were foreign corporations not operating within the State, and the cause of action arose outside. In *Michigan Central Railroad Co.* v. *Mix et al.* (U. S. Supreme Court, decided February 18, 1929), plaintiff became a resident of Missouri after the injury, but before suit, and plaintiff's intestate, an employee of defendant, resided in

Michigan when killed there. Defendant was a foreign corporation not operating within Missouri, and the cause of action arose outside. This Court said:

> "The mere fact that she had acquired a residence within Missouri before commencing the action does not make reasonable the imposition upon interstate commerce of the heavy burden which would be entailed in trying the cause in a State remote from that in which the accident occurred and in which both parties resided at the time."

In *Atchison Ry. Co.* v. *Wells*, 265 U. S. 101, plaintiff was a non-resident, defendant a foreign corporation not operating within the State, and the cause of action arose outside. In *Weinard* v. *Chicago, M. & St. P. Ry. Co.*, 298 Fed. 977, the plaintiff was a non-resident, defendant a foreign corporation operating within the State, cause of action arose outside. The action was brought under the Federal Employers' Liability Act and is analogous to the case at bar.

Davis v. *Farmers Co-operative Co., supra*, did not decide the case where plaintiff was a resident, defendant a foreign corporation not operating within the State, and the cause of action arose outside, but the service was held invalid in *Thurman* v. *Chicago, etc., Ry.*, 254 Mass. 569. Also, *Davis* v. *Farmers Co-operative Co., supra*, expressly did not decide the case where plaintiff was a foreign corporation, defendant a foreign corporation not operating within the State, the cause of action arising outside but the transaction out of which it arose within the State.

We have noted that *Leon* v. *Central of Ga. R. R.*, 213 App. Div. 853 (1925), followed *Davis* v. *Farmers Co-oper-*

ative Co., supra, and *Cancelmo* v. *Seaboard Air Line Ry. Co.,* 12 Fed. (2d) 166, 169 (1926), refers to it but does not pass upon the question.

(2) *Cases Holding Suit not to be Burden on Interstate Commerce:*

In *St. Louis B. & M. Ry.* v. *Taylor,* 266 U. S. 200, plaintiff was a foreign corporation, but doing business within the State, defendant a foreign corporation and not operating within, the goods were deliverable within the State, and the negligent act was possibly within. In *International Harvester* v. *Kentucky, supra,* plaintiff was a resident, the defendant a foreign corporation operating within the State, and the cause of action arose within. In *Hoffman* v. *Foraker,* 274 U. S. 21, the plaintiff was a non-resident, the defendant a domestic corporation operating within the State, and the cause of action arose outside. In *Griffin* v. *Seaboard Air Line Ry. Co.,* 28 Fed. (2d) 998, the plaintiff was a resident, the defendant a foreign corporation and not operating within the State, and the cause of action arose outside. In *Schendel* v. *M'Gee,* 300 Fed. 273, plaintiff was a non-resident, who started suit in the United States District Court for the District of Minnesota. The defendant was a foreign corporation operating within Minnesota, and the cause of action arose outside. It was, of course, held that the Federal Employers' Liability Act gave a right to bring the action in the United States District Court. In *Maverick Mills* v. *Davis,* 294 Fed. 404, the plaintiff was a resident, the defendant a foreign corporation doing business within the State, and the cause of action arose outside.

In New York we find *Hewitt* v. *Canadian Pac. Ry.,* 124

Misc. Rep. 186, affirmed in 212 App. Div. 815 (1924), where the plaintiff was a resident, the defendant a foreign corporation doing business within, and the cause of action arose partly within the State. The motion to vacate was denied on the authority of *St. Louis, B. & M. Ry.* v. *Taylor, supra.* This last case was also cited in *Johnston* v. *Atlantic Coast Line R. Co.*, 128 Misc. Rep. 82 (1926).

In the case at bar petitioner was a non-resident, respondent a foreign corporation operating within the State, and the cause of action arose outside. These are the facts in *Weinard* v. *Chicago, M. & St. P. Ry. Co., supra,* where the action was held to be a burden upon interstate commerce, and also the facts of *Schendel* v. *M'Gee, supra,* but there the action was brought in the United States District Court as expressly provided by Congress, and the opinion recognizes the burden. We do not understand why the reasoning of *Davis* v. *Farmers Co-operative Co., supra,* does not apply with full force.

(g) Section 2 of Article IV of the Constitution of the United States does not grant either to residents or citizens of Connecticut, as such, the absolute right to maintain transitory actions in the courts of New York against other residents or citizens of Connecticut for a cause of action arising in Connecticut.

This is amply demonstrated by the fact that it has long been customary for courts of equity at the domicile of the parties where the cause of action accrues to enjoin the prosecution of the suit in the courts of a sister State upon facts warranting equitable relief. *Cole* v. *Cunningham*, 133 U. S. 107.

Such an injunction has been granted upon a set of facts similar to the case at bar and arising under the Federal Employers' Liability Act. *Reed's Administrator* v. *Illinois Central R. Co.*, 182 Ky. 445.

Since petitioner could have been enjoined in Connecticut from prosecuting his action in New York it is submitted that the dismissal of the summons and complaint in New York violated no constitutional right of petitioner and that the dismissal was reasonable.

(h) The action of the New York courts pursuant to the statute in question amounted merely to a regulation of venue.

It has long been customary for several States to require that a non-resident must sue a resident in the county in which the resident resides but to permit the non-resident to be sued by the resident in any county where personal service may be had. Thus, in so far as venue is concerned, the non-resident may be subjected to different requirements and it has never been held that such differences in treatment violate Section 2 of Article IV of the United States Constitution.

Petitioner could have brought his action in the Federal Court for the Southern District of New York as a matter of right. Act of Congress of April 22, 1908, Ch. 149, Sec. 6, as amended by the Act of April 5, 1910, Ch. 143, Sec. 1, being 35 Stat. 66 and 36 Stat. 291. The action of the Supreme Court of New York in dismissing the summons and complaint relegates non-residents to the federal courts of New York but allows residents to bring suit

either in the federal courts of New York or the state courts of New York. In requiring the non-resident to lay his venue only in the federal courts of New York the state court did not act unreasonably because the state courts are supported by the residents of the State whereas the federal courts are supported by the federal government which draws its revenue from the forty-eight States. Please see *Canadian Northern Railway Co.* v. *Eggen, supra,* and *Blake* v. *McClung, supra.*

For general treatment of this subject matter of Point I please see Yale Law Journal, Vol. XXXVII, May, 1928, pp. 983-987; Harvard Law Review, Vol. XLI, Jan., 1928, pp. 387-390; Columbia Law Review, Vol. XXIX, Jan., 1929, pp. 1-34. This court has adopted a liberal policy of interpretation of the equal privileges clause. It considers the facts of each case to determine the possible existence of hostility. It applies the doctrine of presumption of constitutionality of a statute. It looks to see whether the plaintiff has been unduly prejudiced. It refuses to define or limit in general. The purpose of the section derived from Art. IV of the Articles of Confederation is "The better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union." We respectfully submit that this purpose does not require this court to sustain petitioner's claim.

POINT II

The Courts of New York are invested with discretion to entertain jurisdiction of an action brought under the Federal Employers' Liability Act by a resident of Connecticut, who also happens to be a citizen of that State, against a corporation railroad common carrier, organized and existing under the laws of the State of Connecticut, doing business in the State of New York at the time of the commencement of the action and at the time of the commission of the tort, the cause of action arising out of a tort committed in the State of Connecticut.

The above is, in effect, the decision of the Court of Appeals in *Douglas* v. *The New York, New Haven and Hartford Railroad Company*, decided on May 29th, 1928, on the authority of *Murnan* v. *Wabash Railway Co., supra.*

The opinion in the latter case recites that there has been no attempt by Congress to enlarge or regulate jurisdiction of state courts; that notwithstanding the Federal Employers' Liability Act the States may still proceed in conformity with their general principles of practice; that the New York courts exercise their discretion in similar cases; and that to hold otherwise would be an unreasonable conclusion and a resulting invasion of state tribunals.

(a) Congress has not attempted to enlarge state jurisdiction by the Federal Employers' Liability Act.

In the first place, this is indicated by the wording of the statute itself. The Act of Congress of April 22nd, 1908, c. 149, § 6, as amended by the Act of April 5th, 1910, c.

143, § 1, being 35 Stat. 66 and 36 Stat. 291, reads in part as follows:

> "Under this Act an action may be brought in a (circuit court) of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

In the second place, the effect of the use of the word "concurrent" is analogous to its use in the Eighteenth Amendment of the Constitution. It does not mean joint jurisdiction any more than "concurrent power" in the Eighteenth Amendment means joint power. *National Prohibition Cases*, 253 U. S. 350, 387. Furthermore, neither the statute nor the Amendment is "the source of the power of the states." *United States* v. *Lanza*, 260 U. S. 377, 381; *Hebert* v. *Louisiana*, 272 U. S. 312, 315.

In the third place, in the Act quoted we find the words "competent jurisdiction," referring to the state courts. Now the Judicial Code, § 28, Act March 3rd, 1911, c. 231, § 28, 36 Stat. 1094, as amended, Act January 20th, 1914, c. 11, 38 Stat. 278, reads in part as follows:

> "Provided, That no case arising under an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases,' approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and

> brought in any State court of competent jurisdiction shall be removed to any court of the United States."

Here again are the words "competent jurisdiction." Manifestly Congress intended not to enlarge state jurisdiction, for otherwise the phrasing would be totally unnecessary.

The decisions of this and of other courts bear out this statutory interpretation. In *Chambers* v. *Baltimore & Ohio R. R., supra,* it was held "subject to the restrictions of the Federal Constitution, the State may determine the limits of the jurisdiction of its Courts, and the character of the controversies which shall be heard in them" (p. 148). While this case was decided in 1907 and consequently could not refer to the effect of the Act under consideration, it enunciated a general principle of long standing.

The cause of action in *Second Employers' Liability Cases,* 223 U. S. 1, was based on the 1908 Act. The Supreme Court of Errors of Connecticut had erroneously expressed the opinion that the federal courts had exclusive jurisdiction. This court said that the enforcement of the Act was not restricted to the federal courts; that the Act did not grant jurisdiction to the state courts, did not enlarge or regulate jurisdiction. The courts in Connecticut were accustomed to exercise jurisdiction of personal injury and death cases arising in another State (pp. 348, 349).

The opinion reads in part as follows:

> "We come next to consider whether rights arising under the congressional act may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to

the occasion. The first of the cases now before us was begun in one of the Superior Courts of the State of Connecticut, and, in that case, the Supreme Court of Errors of the State answered the question in the negative. That, however, was not because the ordinary jurisdiction of the Superior Courts, as defined by the constitution and laws of the State, was deemed inadequate or not adapted to the adjudication of such a case, but because the Supreme Court of Errors was of opinion (1) that the congressional act impliedly restricts the enforcement of the rights which it creates to the Federal courts, and (2) that, if this be not so, the Superior Courts are not at liberty to decline cognizance of actions to enforce rights arising under that act, because (a) the policy manifested by it is not in accord with the policy of the State respecting the liability of employers to employes for injuries received by the latter while in the service of the former, and (b) it would be inconvenient and confusing for the same court, in dealing with cases of the same general class, to apply in some the standards of right established by the congressional act and in others the different standards recognized by the laws of the State.

"* * * The amendment, as appears by its language, instead of granting jurisdiction to the state courts, presupposes that they already possessed it.

"Because of some general observation in the opinion of the Supreme Court of Errors, and to the end that the remaining ground of decision advanced therein may be more accurately understood, we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take

> cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure. We say 'when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion,' because we are advised by the decisions of the Supreme Court of Errors that the Superior Courts of the State are courts of general jurisdiction, are empowered to take cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction, not only in cases where the right of action arose under the laws of that State, but also in cases where it arose in another State, under its laws, and in circumstances in which the laws of Connecticut give no right of recovery as where the causal negligence was that of a fellow-servant" (pp. 55-57).

In *Walton* v. *Pryor, et al.*, 276 Ill. 563, 245 U. S. 675, suit was brought under the Federal Employers' Liability Act, the death occurring in Missouri. The Illinois law provided that no action should be brought to recover damages for death occurring outside of Illinois. That State refused to entertain the suit, the court saying:

> "The Supreme Court of the United States has said that there has been no attempt of Congress to enlarge the jurisdiction of the State courts but only to require its exercise consistently with local laws, and the enforcement of liability for damages occasioned by a death outside of the State is not consistent with such laws" (pp. 570, 571).

In *Loftus* v. *Pennsylvania R. Co., supra,* an action under the Federal Employers' Liability Act was denied a hearing because the law of the State excluded from the jurisdiction of its courts all causes against railroads for

injuries suffered outside the State, unless claimant was a resident.

Loftus, a resident and citizen of Pennsylvania, an employee of the Pennsylvania Railroad Company, a corporation organized under the laws of Pennsylvania, brought suit under the Federal Employers' Liability Act to recover damages for injuries received in Pennsylvania. The suit was brought in Ohio, where the defendant operated. Defendant moved to quash the service of the summons. It was held that the federal lawmaking power could not confer compulsory jurisdiction upon the trial courts of Ohio; that the federal statute created the right but the States provided the remedy of establishing courts and declaring their jurisdiction.

(b) Congress cannot enlarge state jurisdiction.

Was it not held by Mr. Justice Story in *Martin* v. *Hunter*, 1 Wheat. 304, that Congress could not confer any of the judicial power of the United States upon the state courts? The situation was clearly explained by Mr. Justice Washington in *Houston* v. *Moore*, 5 Wheat. 1,—that Congress cannot confer any of the judicial power of the United States upon the state courts, but the latter may exercise jurisdiction even over causes arising out of the acts of Congress, if they have the authority in their own inherent powers and if Congress has not made the jurisdiction of the federal courts exclusive.

In *Rushworth* v. *Judge of Hudson Common Pleas*, 58 N. J. L. 97, the relator was refused naturalization in New Jersey solely upon the ground his application was not made in accordance with the New Jersey statute. The fed-

eral statute involved had expressly selected the state courts as one of the federal agencies to hear and act upon application for naturalization.

Held:

> "• • • Congress is without power to interfere with or control state courts, except in so far as the federal courts have appellate jurisdiction" (p. 100).
>
> "The state establishes its own courts, defines their jurisdiction, appoints its judges and pays their salaries" (p. 101).

The opinion in *Murnan* v. *Wabash Railway Co., supra,* on the authority of which this case was decided by the Court of Appeals, reads on page 248 as follows:

> "The courts of New York exercise their discretion in all other cases where a tort action is brought by one non-resident against another under the laws of another State. The practice may be anomalous but it is well established. That Congress has undertaken to regulate the exercise of jurisdiction by our courts by making compulsory what in other similar cases is discretionary, seems an unreasonable conclusion and a resulting invasion of the powers of our tribunals as heretofore exercised. We conclude that a litigant who brings his action under the Federal Employers' Liability Act stands before the court in no different attitude than a litigant who brings his action under the statute of a sister State. He may not be cast out because he is suing under the act of Congress. He may not enforce his rights merely because he is suing under the act."

Petitioner's claim amounts to this—because he sues under a federal statute he is entitled, *ipso facto,* to

sue in a state court although otherwise he would not be so entitled. There is no dispute that the Act in question is part of the supreme law of the land. *Claflin* v. *Houseman*, 93 U. S. 130, 137. But the Act does not impose jurisdiction except upon the federal courts. The laws of the State must determine whether "the State has cognizance of the cause of action and may acquire jurisdiction of the parties." *Trapp* v. *Baltimore & Ohio R. Co.*, 283 Fed. 655, at page 656. Each State decides for itself the jurisdictional limitations of its courts.

State jurisdiction must extend to the very case. *Walton* v. *Pryor, supra; Rushworth* v. *Judges of Hudson Common Pleas, supra; Anglo-American Provision Co.* v. *Davis Provision Co., supra.*

Furthermore, a State may refuse to entertain jurisdiction, notwithstanding the effect is to exclude an action under a federal statute. *Walton* v. *Pryor, supra*, denied jurisdiction to an action brought under the Federal Employers' Liability Act because of a provision of a state statute. This Court said in *Anglo-American Provision Co.* v. *Davis Provision Co., supra*, that even the constitutional clause of full faith and credit did not impose jurisdiction upon a state court in a suit upon a judgment where the state court rendering the judgment did not have jurisdiction of the original cause of action.

In general Congress cannot impose jurisdiction upon state courts, can leave jurisdiction to state courts over causes arising out of acts of Congress, can make jurisdiction of federal courts exclusive over causes of action arising out of acts of Congress. New York, having con-

current jurisdiction, "is free to adopt such remedies, and to attach to them such incidents, as it sees fit." *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109. See also *Engel* v. *Davenport*, 271 U. S. 33, 37, 38; *St. Louis & Iron Mt. Ry.* v. *Taylor*, 210 U. S. 281, 285, 38 Harvard Law Review, 545, 546.

Petitioner's brief shows a confusion of thought in respect of the general jurisdiction of the New York Supreme Court. *Robinson* v. *Oceanic Steam Nav. Co., supra*, makes clear the legislative control of action by non-residents against foreign corporations. See also N. Y. State Constitution, Art. I, § 16.

CONCLUSION

We respectfully submit that the judgment should be affirmed.

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Supreme Court of the United States

October Term, 1926

No. 313

CHARLES L. DOUGLAS, Petitioner,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

BRIEF OF THE ATTORNEY GENERAL OF NEW YORK, AMICUS CURIAE

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LAW REVIEWS

Columbia, January, 1929, (Vol. XXIX, No. 1)

The Doctrine of Forum Non Conveniens in Anglo-American Law 12

SUPREME COURT OF THE UNITED STATES

October Term, 1928.

Charles L. Douglas, Petitioner,
against
The New York, New Haven and Hartford Railroad Company.

Brief of the Attorney-General of New York, *amicus curiae*.

Permission therefor having been granted by the Court, the following thoughts having a bearing upon the questions presented upon this review are respectfully addressed to the Court's attention.

The record appears to be sufficient to present the question:

> Must the Supreme Court of New York take jurisdiction of an action brought under the Federal Employers' Liability Act by a citizen of another State against a corporation of another State doing business in New York where the negligent act was committed without the State of New York?

After a careful study of the authorities, we have reached the conclusion that the Court may

take, or, in the exercise of a sound discretion, may decline, jurisdiction in the circumstances described. The reasons which have led to this conclusion may be summarized as follows:

I. The Employers' Liability Act has not enlarged or regulated the jurisdiction of State courts and does not control or affect their modes of procedure; it requires only that State courts shall take cognizance of actions brought thereunder when their ordinary jurisdiction as prescribed by local laws is appropriate and adequate to the occasion and is invoked in conformity with those laws.

II. The jurisdiction of the Supreme Court of New York in actions brought by non-resident plaintiffs against foreign corporations for torts committed outside the State, is subject to the regulation and control of the legislature.

III. The statutes of New York restrict the jurisdiction of its Supreme Court over causes of action arising out of torts committed outside the State where the plaintiff is a non-resident and the defendant a foreign corporation to those cases where the court, in the exercise of a sound discretion, shall determine that the action ought to be brought in a court of this State.

IV. The jurisdiction of the New York Supreme Court, as limited by statute, is not adequate to this occasion.

V. The New York statute, as construed by its courts, is violative of no provision of the Federal Constitution.

ARGUMENT

POINT I

The Employers' Liability Act has not enlarged or regulated the jurisdiction of state courts and does not control or affect their modes of procedure; it requires only that state courts shall take cognizance of actions brought thereunder when their ordinary jurisdiction as prescribed by local laws is appropriate and adequate to the occasion and is invoked in conformity with those laws.

This point has been so clearly and definitely decided by this Court (*Mondou* v. *New York, New Haven & Hartford Railroad Co.*, 223 U. S. 1, 55-57; *St. Louis, B. & M. Ry. Co.* v. *Taylor*, 266 U. S. 200, 208) that no more than its mere statement seems required. In the first case cited, this Court said:

> "* * * we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure. We say 'when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion,' because we are advised by the decisions of the Supreme Court of Errors that the Superior Courts of the State are courts of general

jurisdiction, are empowered to take cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction, not only in cases where the right of action arose under the laws of that State, but also in cases where it arose in another State, under its laws, and in circumstances in which the laws of Connecticut give no right of recovery, as where the causal negligence was that of a fellow-servant."

Applying these observations to the facts of a case identical in all essential particulars with the case at bar, Judge Pound, writing for the Court of Appeals of New York, said, in *Murnan* v. *Wabash Railway Co.* (246 N. Y. 244, 247-248):

> "The case (*Mondou* v. *N. Y., N. H. & H. R. R. Co., supra*) is authority for the bare proposition that where the State courts would exercise their jurisdiction except for the fact that the action is brought under the act of Congress, they may not refuse to exercise jurisdiction because the action is brought under the laws of the United States. The court said: 'The existence of the jurisdiction creates an implication of duty to exercise it • • •. We conclude that rights arising under the act in question may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion.' (p. 58).
>
> "This general language read in connection with what was actually decided means nothing more than that the State courts must

make no hostile discrimination against litigants who come within the act in question; that they must treat litigants under the Federal act as other litigants are treated; that they are to act in conformity with their general principles of practice and procedure and are not to deny jurisdiction merely because the right of action arises under the act of Congress.

"The court seems to make this meaning clear. It says in substance that it is advised by decisions of the Supreme Court of Errors that the Superior Courts of the State of Connecticut are not only empowered to take cognizance of actions to recover for personal injuries and death but *are accustomed* to exercise that jurisdiction in cases where the right of action arises under the laws of another State. It says further: 'We deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts or *to control or affect their modes of procedure*, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the Act of Congress and susceptible of adjudication according to the *prevailing rules of procedure*.' (p. 57).

"The courts of New York exercise their discretion in all other cases where a tort action is brought by one non-resident against

> another under the laws of another State. The practice may be anomalous but it is well established. That Congress has undertaken to regulate the exercise of jurisdiction by our courts by making compulsory what in other similar cases is discretionary, seems an unreasonable conclusion and a resulting invasion of the powers of our tribunals as heretofore exercised. We conclude that a litigant who brings his action under the Federal Employers' Liability Act stands before the court in no different attitude than a litigant who brings his action under the statute of a sister State. He may not be cast out because he is suing under the act of Congress. He may not enforce his rights merely because he is suing under the act."

That the learned jurist who wrote the foregoing opinion has correctly interpreted the Act in question and the opinion of this Court construing the same seems clear beyond doubt when we consider that portion of the Act (§ 6, as amended Apr. 5, 1910; Chap. 143, § 1; 36 Stat. 291) prescribing the jurisdiction of the Federal courts. That section in effect provides that, where the action is brought in a court of the United States, it shall be brought in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of the commencement of the action. It is not provided that that shall be the rule when the action is brought in the State courts, but recognition is given to the fact that some limitation upon the venue is proper and desirable. No attempt having been made to pre-

scribe what that limitation in the State courts should be, it seems entirely reasonable to suppose that Congress intended that the State laws and rules on the subject should prevail.

In the petitioner's brief on re-argument, received since the preparation of this brief, counsel seem to infer, if not affirm, that this venue provision of the Federal Act applies when the action is brought in the State courts as well as when brought in the Federal courts. Such, of course, is not the case. The language is "Under this act an action may be brought in a *district court of the United States*, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of the commencement of such action." (Italics ours.)

To the same effect as the *Murnan* case is *Loftus* v. *Pennsylvania R. Co.*, 107 Ohio St. 352, 140 N. E. 94, writ of error dismissed on stipulation 266 U. S. 639.

For the sake of completeness, we may say in passing that it seems to be well established that, had Congress attempted to create jurisdiction in, or to enlarge the jurisdiction of, State courts, its act would have been ineffective to accomplish that purpose. *Anglo-Am. Prov. Co.* v. *Davis Prov. Co.*, 191 U. S. 373, 374.

POINT II

The jurisdiction of the Supreme Court of New York in actions brought by non-resident plaintiffs against foreign corporations for torts committed outside the state is subject to the regulation and control of the legislature.

The Supreme Court of New York is a court of broad inherent jurisdiction. Its history dates back to an Act of the Colonial Assembly adopted May 6, 1691. By that Act, the Court was "fully Impowered and Authorized to have Cognizance of all pleas, Civill Criminall, and Mixt, as fully and amply to all Intents & purposes whatsoever, as the Courts of Kings Bench, Comon Pleas, & Exchequer within their Majestyes Kingdome of England, have or ought to have." (1 Col. Laws, p. 226.) Its existence was recognized by the first and second Constitutions (Const. of 1777, §§ 33-37, 41; Const. of 1821, Art. V, §§ 1-7). The third Constitution enacted that there should "be a Supreme Court having general jurisdiction in law and equity." (Const. of 1846, Art. VI, § 3). By the present Constitution, it is provided: "The supreme court is continued with general jurisdiction in law and equity, subject to such appellate jurisdiction of the court of appeals as now is or hereafter may be prescribed by law not inconsistent with this article." (Const. of 1894, Art. VI, § 1.)

Notwithstanding its broad general powers, the jurisdiction of the court is to some extent subject to the control and regulation of the legislature. The present Constitution provides: "Such parts of the common law, and of the acts of the Legislature of the colony of New York, as together did

form the law of the said colony, on the nineteenth day of April, one thousand seven hundred and seventy-five, and the resolutions of the Congress of the said colony, and of the convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred and seventy-seven, which have not since expired, or been repealed or altered; and such acts of the Legislature of this State as are now in force, shall be and continue the law of this State, subject to such alterations as the Legislature shall make concerning the same." (Art. I, § 16.)

Among the particulars in which the jurisdiction is subject to the control of the legislature are actions by non-residents against foreign corporations. *Robinson* v. *Oceanic Steam Navigation Co.*, 112 N. Y. 315. In the case cited, the court, referring to the provisions of the Code of Civil Procedure on the subject, said: "The jurisdiction of the courts is defined and limited and absolutely confined to the cases specified (therein)."

POINT III

The statutes of New York restrict the jurisdiction of its supreme court over causes of action arising out of torts committed outside the state where the plaintiff is a non-resident and the defendant a foreign corporation to those cases where the court, in the exercise of a sound discretion, shall determine that the action ought to be brought in a court of this state.

In the absence of any statute expressly limiting jurisdiction, the Supreme Court, by virtue of its general jurisdiction, could entertain actions against foreign corporations for any cause of

action provided jurisdiction of their persons could be obtained. It was so held in an action brought by a non-resident against a foreign corporation for a cause of action which arose without the State. *McCormick* v. *Pennsylvania Railroad Co.*, 49 N. Y. 303. At that time, the Statute (Code of Procedure, § 427, added by Act of April 11, 1849) provided for an action against a foreign corporation "by a plaintiff not a resident of this State, when the cause of action shall have arisen, or the subject of the action shall be situated within the State," but contained no express limitation upon the power of the court to entertain suits for other causes of action.

Upon the enactment of the Code of Civil Procedure in 1876, the provisions of § 427 of the former Code were carried into § 1780, amended to read as follows:

> "An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action. An action against a foreign corporation *may be maintained* by another foreign corporation, or by a non-resident, *in one of the following cases only*." (Italics ours.)
>
> 1. Where the action is brought to recover damages for the breach of a contract, made within the State, or relating to property situated within the State, at the time of the making thereof.
>
> 2. Where it is brought to recover real property situated within the State, or a chattel, which is replevied within the State.
>
> 3. Where the cause of action arose within

> the State, except where the object of the action is to affect the title to real property situated without the State."

This amendment had the effect of restricting the jurisdiction of the court and thereafter an action by a non-resident plaintiff against a foreign corporation could be maintained only in the cases specified, and in no case for a cause of action which arose outside of the State limits. *Robinson* v. *Oceanic Steam Navigation Co., supra.*

This section was amended by Chapter 60 of the Laws of 1913, to include the following provision:

> "4. Where a foreign corporation is doing business within this state."

Upon the adoption of the present Civil Practice Act in 1920, the provisions of § 1780 of the Code of Civil Procedure, as so amended, were transferred to the General Corporation Law, the first sentence becoming § 46 and the remainder § 47 of that Law. (Laws 1920, ch. 916.)

Under the statute, as thus amended, the State courts have held that the Supreme Court is again invested with a discretionary jurisdiction in respect to actions by non-residents against foreign corporations doing business in the State for torts committed without the State. *Murnan* v. *Wabash Railway Co., supra; Gregonis* v. *P. & R. Coal & Iron Co.*, 235 N. Y. 152, 160; *Schwencke* v. *Central R. R. of N. J.*, 200 N. Y. S. 774; *Waisikoski* v. *Philadelphia & Reading C. & I. Co.*, 173 App. Div. 538, aff'd. 228 N. Y. 581 on the opinion below. This construction of the statute appears to be based not only on the permissive character of the language employed but on the court's conclusion

that the legislature did not intend that any different rule should prevail in respect to actions against foreign corporations than prevailed in actions against non-resident individuals. It had long been the rule that the courts might in their discretion refuse to entertain jurisdiction over causes of action arising out of a tort committed in a foreign state, where both the plaintiff and defendant were non-residents. *Gardner* v. *Thomas* (1817), 14 Johns. 134; *Johnson* v. *Dalton* (1823), 1 Cowen 543; *DeWitt* v. *Buchanan* (1868), 54 Barb. 31; *Burdick* v. *Freeman* (1890), 120 N. Y. 420, 425–6; *Hoes* v. *N. Y., N. H. & H. R. R. Co.* (1903), 173 N. Y. 435, 441; *Collard* v. *Beach* (1903), 81 App. Div. 582, 585; *Pietraroia* v. *N. J. & H. R. R. & F. Co.* (1910), 197 N. Y. 434, 437; *Zeikus* v. *Florida East Coast Ry. Co.* (1911), 70 Misc. 339; 144 App. Div. 91.

The reason for the rule has been variously stated. Some of the authorities emphasize the burden which assumption of jurisdiction would place upon our courts, with the attendant impediment of the administration of justice and expense to our taxpayers. While perhaps this reason is a sufficiently cogent one, we prefer to believe, as indicated in *Wasikoski* v. *Philadelphia & Reading C. & I. Co.*, *supra*, and *Zeikus* v. *Florida East Coast Ry. Co.*, *supra*, that the rule is founded upon the doctrine of *forum non conveniens*.* Lord Shaw, in Société du Gaz de Paris v. Société Anonyme de Navigation "Les Armateurs Fran-

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* For an interesting discussion of this doctrine, we refer to *Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law*, Columbia Law Review, January, 1929 (Vol. XXIX, No. 1.)

cais," (1926) Sess. Cas. (H. L.) 13, has stated the rule as follows:

> "If in the whole circumstances of the case it be discovered that there is a real unfairness to one of the suitors in permitting the choice of a forum which is not the natural or proper forum, either on the ground of convenience of trial or the residence or domicile of parties, or of its being either the *locus contractus*, or the *locus solutionis*, then the doctrine of *forum non conveniens* is properly applied."

As said by Page, J., in *Ziekus* v. *Florida East Coast Railway Co., supra*,

> "If the action should be tried here on issues of fact, the witnesses would have to be brought from that State, which is quite remote, or the entire testimony would have to be taken by depositions; a class of cases of which the courts of this State have repeatedly declined to take jurisdiction."

In cases such as we are discussing, where there is an entire absence of nexus between the court and the controversy, it would seem that special reason exists for the application of the doctrine, and we believe that to be the real foundation for the existing rule.

We have discussed the questions in this and the preceding point at this length, partly because the discussion may be of some aid in determining the constitutional question hereinafter discussed, and partly because of the statements in the petitioner's brief (p. 27) to the effect that the statute expressly authorizes such an action as this and that

the decisions of the New York courts holding the statute permissive only are contrary to the greater weight of authority. We assume that this court will, quite regardless of whether it would have reached the same conclusion or not, accept the construction placed upon the statute by the State's highest court, and also the decision of that court determining the jurisdiction of the State courts, except as such jurisdiction may be affected by constitutional considerations, as final and conclusive upon those subjects. *Knights of Pythias* v. *Meyer*, 265 U. S. 30, 32; *Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142, 149; *Missouri Pacific R. R. Co.* v. *Clarendon Boat Oar Co.*, 257 U. S. 533, 534; *Anglo-Am. Prov. Co.* v. *Davis Prov. Co., supra*, at page 374.

POINT IV

The Jurisdiction of the New York Supreme Court, as limited by statute, is not adequate to this occasion.

In *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, this court said:

> "Each State may, subject to the restrictions of the Federal Constitution, determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and specifically how far it will, having jurisdiction of the parties, entertain in its courts transitory actions where the cause of action has arisen outside its borders."

The State of New York has by statutory enactment and judicial construction determined that

its courts shall have a discretionary jurisdiction to entertain actions between non-resident parties for causes of action in tort arising outside its borders, the exercise of jurisdiction to be dependent upon whether the action may with propriety and convenience be tried in this State. The State could have determined that its courts would not entertain such actions in any event. Had it done so, no one would question that jurisdiction was entirely lacking. That it has seen fit to grant a discretionary or conditional jurisdiction in such cases cannot be seized upon as a general grant of jurisdiction in all such cases. He who would avail himself of the jurisdiction must bring himself within the conditions. This, the courts of New York have determined, the petitioner has not done.

If this action had been brought under the laws of Connecticut, where the plaintiff resides, the defendant was incorporated and the cause of action arose, instead of under a Federal statute, a claim that the taking of jurisdiction by our courts was compulsory regardless of the circumstances would be looked upon as little short of preposterous. How does the fact that the action has been brought under the Federal statute affect the question? The Federal statute has neither created nor enlarged the jurisdiction. It requires only that the court shall take cognizance of the action when the jurisdiction which it is accustomed to exercise shall be sufficient or adequate to the occasion. As Judge Pound has said in the *Murnan* case, "a litigant who brings his action under the Federal Employers' Liability Act stands before the court in no different attitude than a litigant who brings his action under the stat-

ute of a sister State. He may not be cast out because he is suing under the act of Congress. He may not enforce his rights merely because he is suing under the act."

Clearly, a statute which requires the court to exercise a sound discretion is not adequate to the occasion when the court has found that the facts and circumstances upon which it is required to act are not sufficient to warrant the taking of jurisdiction.

POINT V

The New York statute, as construed by its courts, is violative of no provision of the federal constitution.

The provision of the Constitution upon which reliance is placed by the petitioner is the first clause of Article 4, Section 2:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States."

It is not to be doubted that among the privileges insured to the citizens of the several states by this clause is the right to institute and defend actions. *Corfield* v. *Coryell*, 4 Wash. C. C. 371, 380; *Ward* v. *Maryland*, 12 Wall. 418, 430; *Cole* v. *Cunningham*, 133 U. S. 107, 114; *Blake* v. *McClung*, 172 U. S. 239, 252; *Chambers* v. *Baltimore & Ohio R. R. Co.*, *supra*; *Canadian Northern Ry. Co.* v. *Eggen*, 252 U. S. 553; *Missouri Pacific R. R. Co.* v. *Clarendon Boat Oar Co.*, *supra*. Indeed, such right has been said to be one of the highest and most essential privileges of citizenship. *Chambers* v. *Baltimore & Ohio R. R. Co.*, *supra*.

This does not mean, however, that a non-resident is entitled under that clause to precisely the same rights in the courts of a State as residents possess. *Chemung Canal Bank* v. *Lowery*, 93 U. S. 72, 76–77; *Blake* v. *McClung, supra; Canadian Northern Ry. Co.* v. *Eggen, supra; Hess* v. *Pawloski*, 274 U. S. 352, 355–356; *Klotz* v. *Angle*, 220 N. Y. 347, 358; *Walton* v. *Pryor*, 276 Ill. 563, 115 N. E. 2.

In *Chemung Canal Bank* v. *Lowery, supra*, this court said:

> "This statute may be expressed shortly thus: When the defendant is out of the State, the Statute of Limitations shall not run against the plaintiff, if the latter resides in the State, but shall, if he resides out of the State. The argument of the plaintiff is, that, as the law refuses to non-residents of the State an exemption from its provisions, which is accorded to residents, it is repugnant to that clause of the Constitution of the United States (art. 4, sect. 2) which declares that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.' It is contended, that, if the resident creditors of the State may sue their non-resident debtors, at any time within six or ten years after they return to the State, non-resident creditors ought to have the same privilege; or else an unjust and unconstitutional discrimination is made against them. This seems, at first view, somewhat plausible; but we do not regard the argument as a sound one. There is, in fact, a valid reason for the discrimination. If the statute does not run

as between non-resident creditors and their debtors, it might often happen that a right of action would be extinguished, perhaps for years, in the State where the parties reside; and yet, if the defendant should be found in Wisconsin—it may be only in a railroad train—a suit could be sprung upon him after the claim had been forgotten. The laws of Wisconsin would thus be used as a trap to catch the unwary defendant, after the laws which had always governed the case had barred any recovery. This would be inequitable and unjust. *Beardsley* v. *Southmayd*, 3 N. J. L. (Green) 171."

Writing for this court in *Canadian Northern Ry. Co.* v. *Eggen*, *supra*, Mr. Justice Clarke said:

"From very early in our history, requirements have been imposed upon non-residents in many, perhaps in all, of the States as a condition of resorting to their courts, which have not been imposed upon resident citizens. For instance, security for costs has very generally been required of a non-resident, but not of a resident citizen, and a non-resident's property in many States may be attached under conditions which would not justify the attaching of a resident citizen's property. This court has said of such requirements:

"Such a regulation of the internal affairs of a State cannot reasonably be characterized as hostile to the fundamental rights of citizens of other States. . . . It has never been supposed that regulations of that character materially interfered with the enjoyment by citizens of each State of the priv-

ileges and immunities secured by the Constitution to citizens of the several States.' *Blake* v. *McClung*, 172 U. S. 239, 256.

"The principle on which this holding rests is that the constitutional requirement is satisfied if the non-resident is given access to the courts of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens. The power is in the courts, ultimately in this court, to determine the adequacy and reasonableness of such terms."

Neither does the clause mean, we believe, that a non-resident may of right come into the courts of a State with a cause of action against a non-resident for a tort committed outside the State when for him to do so would violate every conception of good conscience and fairness toward his adversary and work a serious inconvenience to his own and his adversary's witnesses. It was to prevent the bringing of such actions in the courts of this State when there existed a more convenient forum for the adjudication of the controversy that the courts were invested with a discretionary jurisdiction in such cases. (Cases cited in Point III.)

It is the law of New York and of most if not all of the other States of the Union that, subject to the power of the court to change the place of trial for the convenience of witnesses or for other special reasons, actions between resident parties must be brought and tried in the County in which one of the parties resides, the County in which

the property involved in the litigation is situated or the County in which the cause of action arose. This is a salutary rule, designed to prevent a party for reasons of spite or malice from dragging his adversary into some remote County for the trial. The same rule ought to exist where State instead of county lines form the boundary. We believe no constitutional provision forbids. The distinction in such case is one based, not upon citizenship, but upon *residence*. It has been so held by the courts of New York for nearly a hundred years, and in numerous cases in this court.

In an opinion written by Chief Judge Nelson of the New York Supreme Court of Judicature in 1837 (*Frost & Dickinson* v. *Brisbin*, 19 Wend. 11, 15), he said:

> "But it is said without such interpretation the statute is in violation of the Constitution of the United States, Art. 4, § 2, which ordains that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.' This is obviously an erroneous view of the Constitution. Our own citizens must be *residents* for the month, to be entitled to the exemption under the statute. The privilege from arrest does not depend upon *citizenship or domicile*, any further than they may include residence, but upon *residence*, such as we have endeavored to explain."

This decision was followed in 1885 in *Adams* v. *Penn Bank of Pittsburgh*, 35 Hun, 393, where was involved the identical statute now under consideration, as it then existed. The court said:

"But it is manifest that under section 1780 (Code of Civil Procedure) the right to maintain the action does not depend upon citizenship, but upon residence; and a citizen of this State who actually resides in the State of Pennsylvania cannot by reason of his citizenship sue a corporation of Pennsylvania in our courts, except in one of the cases specifically declared by statute."

Following this was the decision in *Robinson* v. *Oceanic Steam Navigation Co., supra*, decided in 1889, also involving the statute now under consideration, as it then existed. Judge Earl, writing for the court, said:

"It is claimed, however, that section 1780 of the Code, so far as it discriminates between resident and non-resident plaintiffs, is repugnant to section 2 of article 4 of the Federal Constitution, wherein it is provided that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.' This section makes no discrimination between citizens, but between residents and non-residents. Without attempting to define the full scope of that constitutional provision, it is sufficient to say that it has no application to a case like this, and there are numerous decisions to that effect. (*Adams* v. *Penn Bank*, 35 Hun, 393; *Frost* v. *Brisbin*, 19 Wend. 11; *Lemmon* v. *People*, 20 N. Y. 562; *Haney* v. *Marshall*, 9 Md. 194; *Campbell* v. *Morris*, 3 Harris & McHenry [Md.] 534; *Chemung Bank* v. *Lowery*, 93 U. S. 72; *Mc*

> *Cready* v. *Virginia*, 94 id. 396; *Missouri* v. *Lewis*, 101 id. 22.) A construction of the constitutional limitation which would apply it to such a case as this would strike down a large body of laws which have existed in all the states from the foundation of the government, making some discrimination between residents and non-residents in legal proceedings and other matters."

This opinion was cited with approval in *Canadian Northern Ry. Co.* v. *Eggen*, *supra*.

To the same effect are *Klotz* v. *Angle* (1917), *supra*, and, although the question was not discussed in the opinion, *Murnan* v. *Wabash Railway Co.* (1927), *supra*.

In *La Tourette* v. *McMaster*, 248 U. S. 465, a statute of South Carolina provided that only such persons should be licensed to act as brokers to represent citizens of the State for the placing of insurance with insurers in that State or elsewhere as were residents of the State and been licensed insurance agents of the State for at least two years. A citizen of New York attacked the statute as an abridgement of the privileges and immunities guaranteed to him by the Constitution. After referring to the plaintiff's argument, this court, by Mr. Justice McKenna, said:

> "We do not dispute the propositions, and to see if they determine against the act under review we must turn to its words, as did the Supreme Court of the State, whose interpretation of them we must accept. It said, speaking by Mr. Justice Hydrick: 'A citizen of any State of the Union who is a resident

of this State and has been a licensed insurance agent of this State for at least two years may obtain a broker's license; on the other hand, a citizen of this State, who is not a resident of the State and has not been a licensed insurance agent of this State for two years, may not be licensed. No discrimination is made on account of citizenship. It rests alone on residence in the State and experience in the business.' And the court further said: 'Citizenship and residence are not the same thing, nor does one include the other. *Cummings* v. *Wingo*, 31 S. C. 427, 435, 10 S. E. 107, and authorities cited. But our conclusion is not rested upon the mere use of the word "residents"; for no doubt it might appear from the purpose and scope of an act that "residents" was used in the sense of "citizens." If so, the Court would so construe it; and in no event would the Court sanction an evasion of the purpose and intent of this wise and wholesome provision of the Constitution based on mere verbiage. But there is nothing in the act to suggest any such intention. On the contrary, the words "residents" and "citizens" are both used, each apparently in its ordinary legal sense, which is well defined and understood, making a distinction which is substantial in its purpose and one that is sanctioned by the highest judicial authority.' The Court thus distinguishes between citizens and residents and decides that it is the purpose of the statute to do so and, by doing so, it avoids discrimination. In other words, it is the effect of the statute that its requirement applies

> as well to citizens of the State of South Carolina as to citizens of other States, residence and citizenship being different things."

In *Maxwell* v. *Bugbee*, 250 U. S. 525, 538, this court, by Mr. Justice Day, said:

> "The alleged discrimination, here complained of, so far as privileges and immunities of citizenship are concerned, is not strictly applicable to this statute because the difference in the method of taxation rests upon residence and not upon citizenship. *La Tourette* v. *McMaster*, 248 U. S. 465."

Previous decisions of this court upon the subject are *Slaughter House Cases*, 16 Wall. 36; *Robertson* v. *Crase*, 97 U. S. 646; *Steigleder* v. *McQuesten*, 198 U. S. 141.

An extremely interesting and well-reasoned opinion upon this subject is that by Chief Justice Marshall, of the Supreme Court of Ohio, in *Loftus* v. *Pennsylvania R. Co.*, *supra*. The essential facts were identical with those of the case at bar. A resident and citizen of Pennsylvania brought suit under the Employers' Liability Act in the Court of Common Pleas of Ohio against a Pennsylvania corporation doing business in Ohio for personal injuries received in Pennsylvania. A venue statute of Ohio (General Code, § 11273) required actions against common carriers for injuries to persons or property to be brought in the county in which the cause of action or some part thereof arose, or in the county in which the claimant resided at the time when the cause of action arose, if the line of the carrier or any part

of it be located in such county, or if no part of such line be located in such county, then in the county in which any part of such line is located nearest the place where the claimant so resided. The effect of this statute, if upheld, was, of course, to prevent nonresidents of Ohio from instituting actions of the character mentioned in the statute, while permitting the same to residents. As the Court said, "The plain unambiguous meaning to be given to the language employed makes it clear that the Legislature intended to deprive all persons from resorting to the courts of Ohio in cases against the companies named, whether foreign or domestic, unless the injuries to person or property, or the wrongful death, were caused in the state, *or the claimant resides in the state.*" (Italics ours.) Upholding the statute both as against the claim that the Employers' Liability Act required the court to take jurisdiction and that the statute violated the privileges and immunities clause of the Constitution, the Court said upon the latter subject:

> "The scope of this section has been the subject of much discussion in the authorities, and, while these are too numerous to be reviewed, a careful examination of them shows that the courts have conceived the dominant purpose of the section to be to prevent arbitrary and unreasonable discrimination in each state in favor of its own citizens and against the citizens of other states. A state statute does not violate this constitutional mandate if there be no manifest intent to discriminate in favor of a particular class of citizens to the exclusion of

> **others similarly circumstanced and the provisions of the restrictive act be in fact open alike to all citizens who may bring themselves within its terms. Thus, if a citizen of Pennsylvania is a resident of Ohio, or if such citizen is sojourning in or traveling through the state of Ohio, and is injured in person or property within the state, the courts are open to him; and, on the other hand, if a citizen of Ohio is a resident of Pennsylvania and is injured in person or property in that state the courts of Ohio are denied to him. The statute is based upon residence without regard to citizenship. That residence and citizenship are not synonymous, and that discrimination on the basis of residence, within reasonable limits, is not a discrimination against citizenship, within the meaning of the constitutional mandate, is established by many authorities, including the following: *Tanner* v. *De Vinney*, 101 Neb. 46, 161 N. W. 1052; *Canadian Northern Ry Co.* v. *Eggen*, 252 U. S. 553, 40 Sup. Ct. 402, 64 L. Ed. 713; *Robertson* v. *Cease*, 97 U. S. 646, 24 L. Ed. 1057; and *La Tourette* v. *McMaster, Insurance Commission*, 248 U. S. 465, 39 Sup. Ct. 160, 63 L. Ed. 362."**

Counsel for the petitioner state (Brief, p. 22) that this decision does not in the slightest degree support the contention of the defendant, but rather that of the petitioner. We are, however, at a loss to see how it is to be distinguished from the instant case. The effect has been identical. In each case a non-resident citizen has been denied access to the courts of the State which

would have been open to him if he had been a resident. That that end has been accomplished indirectly by a venue statute rather than directly by a statute defining jurisdiction cannot affect the question. The foundation upon which both decisions rests is that residence and not citizenship is the test provided by the statutes. The only difference which we find in the two statutes is that in Ohio the bar is absolute, while in New York it is conditional, depending upon the good faith of the applicant for relief.

To the same effect as the *Loftus* case is *Tanner v. De Vinney*, 101 Neb. 46, 161 N. W. 1052.

In *State ex rel. Prall v. District Court*, 126 Minn, 501, 148 N. W. 463, upon which the petitioner strongly relies, it would appear that the court's study of the question was very superficial, for its appears to have entirely overlooked the differences between citizenship and residence, which differences we consider to be a controlling factor of the case.

Counsel for the petitioner have stated that a resident of New York is either a citizen of the United States and a citizen of New York or a subject of a foreign country and a resident of New York. (Brief, p. 15). Although the Fourteenth Amendment is not mentioned, we assume that the statement is based upon the definition of citizenship contained in that Amendment. The inference which counsel draws is that residence and citizenship are synonymous. This argument was, however, disposed of by this court not long after the Amendment was adopted.

In *Robertson v. Cease*, *supra*, the question was presented whether an allegation that the plaintiff was a *resident* of a State other than that of which

the defendant was a citizen, was a sufficient allegation of diversity of citizenship or of alienage of the plaintiff, either of which allegations would have been sufficient to confer jurisdiction. The argument was made, as here, that citizenship and residence are synonymous. Writing for a unanimous court, Mr. Justice Harlan said:

> "Citizenship and residence, as often declared by this court, are not synonymous terms. (*Parker et al.* v. *Overman*, 18 How. 137.)
>
> "In the oral argument before this court, the inquiry arose, whether since the adoption of the Fourteenth Amendment to the Federal Constitution the mere allegation of residence in Illinois did not make such a *prima facie* case of citizenship in that State as, in the absence of proof, should be deemed sufficient to sustain the jurisdiction of the Circuit Court. That amendment declares that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State where they reside.' It was suggested that a resident of one of the States is *prima facie* either a citizen of the United States or an alien—if a citizen of the United States, and also a resident of one of the States, he is, by the terms of the Fourteenth Amendment, also a citizen of the State wherein he resides—and if an alien, he was entitled in that capacity to sue in the Federal court, without regard to residence in any particular State. It is not to be denied that there is some force in these suggestions, but

> they do not convince us that it is either necessary or wise to modify the rules heretofore established by a long line of decisions upon the subject of the jurisdiction of the Federal courts."

This decision has been followed in numerous cases in this court (*Everhart* v. *Huntsville College*, 120 U. S. 223; *Menard* v. *Goggan*, 121 U. S. 253; *Denny* v. *Pironi*, 141 U. S. 121; *Steigleder* v. *McQuesten*, *supra*), and is, we believe, the foundation of the decisions in *La Tourette* v. *McMaster*, *supra*, and *Maxwell* v. *Bugbee*, *supra*, making the same distinction.

That there is a real distinction seems to have been unintentionally conceded by the petitioner's counsel when he said (p. 15): "In fact the word 'resident' as used in the New York statutes relating to jurisdiction is not only synonymous with 'citizen' but also includes the 'alien' *bona fide* resident of the state"; in other words, the terms are not synonymous at all.

The purpose of the privileges and immunities clause was, we believe, as pointed out by the court in *Loftus* v. *Pennsylvania R. Co.*, *Supra*, and as indicated by the other authorities which we have cited, "to prevent arbitrary and unreasonable discrimination in each state in favor of its own citizens and against the citizens of other states." That the statute under consideration has made no such arbitrary or unreasonable discrimination and that there has been no attempt on the part of New York to evade the purpose or intent of the constitutional provision seems obvious. New York has opened its courts to suits by citizens of its sister States against residents of New York

and against domestic corporations, for any cause. Its courts are open to suits by citizens of its sister States against non-residents of New York and against foreign corporations, for the recovery of damages for the breach of a contract made within the State or relating to property situated in the State at the time of the making of the contract, for the recovery of real property situated within the State or a chattel which is replevied within the State, or for any other cause of action which arose within the State except one affecting the title to real property situated without the State. It has opened its courts to suits by citizens of its sister States against non-residents of New York and against foreign corporations doing business within the State, for any other cause of action except for the recovery of damages for a tort committed without the State. It has denied access to its courts, as a matter of right, in this last class of actions to non-residents, citizen and non-citizen alike, but even then jurisdiction will be taken if the court be satisfied that the ends of justice will be promoted thereby. There is here no question of favoring resident citizens over non-resident citizens. True, a resident citizen, as is a resident who is not a citizen, is entitled as a matter of right to invoke the jurisdiction of our courts in such a case, but that is because his residence here creates a nexus and because considerations of convenience do not require trial elsewhere, at least to the same extent as in the case of non-residents. The citizen of another State is, in such case, entitled to invoke the jurisdiction of the courts of his own State, which jurisdiction may, we concede, be denied to a citizen of New York.

May we suppose the case of a resident of Cali-

fornia, with a cause of action against a resident of Washington, for an assault committed in Oregon. He may select as his forum the appropriate court of any one of the three States named. Can it be that the Constitution requires that he should be permitted also to select a court of New York because of a desire to harass his adversary or because he has an idea, fanciful or otherwise, that he would be able to get a larger verdict there? As was well said by the court in *Lefebvre-Armistead Co.* v. *So. Pac. Co.*, 142 Va. 800, 805, 128 S. E. 244, 245

> "It is not necessary to elaborate upon the injustices of permitting a perambulating suitor to tarry at will by the still waters of some favoring statute, or to scan a list of the judges in the United States until he finds one believed to have an attentive ear and then drag all interested into his tribunal."

We submit that it is as plain as it was in *Canadian Northern Ry. Co.* v. *Eggen, supra*, that "the act assailed was not enacted for the purpose of creating an arbitrary or vexatious discrimination against citizens of Minnesota (New York)," and that it has not that effect.

Up to this point we have omitted any reference to the effect which the rule which the petitioner seeks to impose upon the courts of New York would have upon the validity of their procedure, under the Commerce Clause of the Constitution.

In *Davis* v. *Farmers Co Operative Equity Co.*, 262 U. S. 312, this court condemned as unconstitutional and void, as an unreasonable burden

upon interstate commerce, a State statute which permitted any foreign corporation having an agent in the State for the solicitation of freight and passenger traffic over lines outside the State, to be served with process by delivery of a copy thereof to such agent. In the opinion, Mr. Justice Brandeis, at page 316, said:

> "It may be that a statute like that here assailed would be valid although applied to suits in which the cause of action arose elsewhere, if the transaction out of which it arose had been entered upon within the State, *or if the plaintiff was, when it arose, a resident of the State*. These questions are not before us; and we express no opinion upon them. But orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a State in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, *and in which the plaintiff does not reside*." (Italics ours.)

If in such a case the taking of jurisdiction would entail such an inconvenience as to create an undue burden upon interstate commerce, must it not follow that the same inconvenience in a case where the defendant is not engaged in interstate commerce* would justify a construction of the privileges and immunities clause which would permit the court to relegate the suitor to the

* The defendant in the case at bar is engaged in interstate commerce.

forum of propriety and convenience under the doctrine of *forum non conveniens?*

Another interesting parallel is that described by this court in *Alabama, etc., Ry. Co.* v. *Journey*, 257 U. S. 111. By General Order No. 18, as amended by General Order No. 18-A, the Director General of Railroads had directed that,

> "Whereas it appears that suits against the carriers for personal injuries, freight and damage claims, are being brought in States and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose, the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions or supplies, are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more; which practice is highly prejudicial to the just interests of the government and seriously interferes with the physical operation of the railroads; and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs.
>
> "It is therefore ordered that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose."

This court held that, since the Federal Control Act (Act of March 21, 1918, c. 25, § 10, 40 Stat.

451, 456) permitted enforcement of liabilities against carriers while under Federal control except "in so far as may be inconsistent. . . . . with any order of the President," it was within the powers of the Director General to prescribe the venue of suits, and that the facts set forth in the order showed both the occasion for it and that the venue prescribed was reasonable. Referring to this order, in *Davis* v. *Farmers Co-Operative Co., supra*, at page 316, this court said: "The facts recited in the order, to justify its issue, are of general application, in times of peace as well as of war."

It is not an answer to say that the instant suit is brought under an Act of Congress, which has power to burden interstate commerce as it sees fit. Congress has provided gainst any undue burden so far as the Federal courts are concerned by a proper venue statute. It has left to the States the procedure to be followed when suit is brought in the State courts, and that procedure, like any other procedure in those courts must be such as will not infringe the Constitution.

Emphasis has been laid in the authorities upon the undesirable and perhaps dire effect which a holding that this statute violates the Constitution would have upon existing laws. *Robinson* v. *Oceanic Steam Navigation Co., supra; Canadian Northern Ry. Co.* v. *Eggen, supra; Loftus* v. *Pennsylvania R. Co., supra.* Especially would this be true in respect to actions for divorce. We think we may safely say that the statutes of every State, except South Carolina, confer jurisdiction to grant divorce to residents when under the same circumstances such relief would be denied to non-residents (New York Civil Practice Act, § 1147;

Ohio General Code, § 11980; Pa. St. 1920, § 9156; Ill. R.S. 1874, p. 420; Cal. Civil Code, § 128).

Volumes have been written and thousands of opinions handed down in which it has been assumed, as a matter of course, that the distinction was a permissible one, and which would be rendered inane and senseless if it were not. Indeed, a decree of divorce obtained in a State in which neither party resided, upon service by publication, would be a nullity. *Bell* v. *Bell*, 4 App. Div. (N. Y.) 527, 157 N. Y. 719, 181 U. S. 177; *Andrews* v. *Andrews*, 188 U. S. 14; *Gray* v. *Gray*, 143 N. Y. 354. See also: *Atherton* v. *Atherton*, 181 U. S. 155; *Haddock* v. *Haddock*, 201 U. S. 562; *Thompson* v. *Thompson*, 226 U. S. 551. Shocking indeed is the idea that the jurisdiction in such cases may not be affected by the question of residence or non-residence of the applicant for relief.

Notwithstanding the many cases in which the residence requirement in divorce has been construed and applied, we have been able to find but two instances in which the constitutionality of such requirement has been questioned. In *Pugh* v. *Pugh*, 25 S. D. 7, 124 N. W. 959, the question was raised but the court found it unnecessary to decide it. But in *Worthington* v. *District Court*, 37 Nev. 212, 142 Pac. 230, the question was met and decided. Without going into the court's reasoning in detail, it is sufficient to say that the decision was based upon the court's conclusion that "There is a distinction between citizenship and residence, and the rights of citizens and residents are often different."

In conclusion, may we repeat the words which Judge Earl used in *Robinson* v. *Oceanic Steam Navigation Co.*, in his discussion of the constitu-

tionality of the statute now under consideration, and which were quoted with approval by the Supreme Court of Ohio in *Loftus* v. *Pennsylvania Ry. Co.* and by this court in *Canadian Northern Ry Co.* v. *Eggen:*

> "A construction of the constitutional limitations which would apply it to such a case as this would strike down a large body of laws which have existed in all the States from the foundation of the government, making some discrimination between residents and non-residents in legal proceedings and other matters."

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 312.—October Term, 1928.

Charles L. Douglas, Petitioner, *vs.* The New York, New Haven and Hartford Railroad Company.	On Writ of Certiorari to the Supreme Court of the State of New York, Ninth District.

[May 13, 1929.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit under the Employers Liability Act for personal injuries. The injuries were inflicted in Connecticut, the plaintiff, the petitioner, is a citizen and resident of Connecticut, and the defendant, the respondent, is a Connecticut corporation, although doing business in New York where the suit was brought. Upon motion the trial Court dismissed the action, assuming that the statutes of the State gave it a discretion in the matter, and its action was affirmed by the Appellate Division, 223 App. Div. 782, and by the Court of Appeals, 248 N. Y. 580. Thus it is established that the statute purports to give to the Court the power that it exercised. But the plaintiff says that the Act as construed is void under Article IV, Section 2, of the Constitution of the United States: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." A subordinate argument is added that the jurisdiction is imposed by the Employers Liability Act when as here the Court has authority to entertain the suit. C., Title 45, § 56. Acts of April 22, 1908, C., 149, § 6, 35 Stat. 66, April 5, 1910, c. 143, § 1, 36 Stat. 291. That section gives concurrent jurisdiction to the Courts of the United States and the States and forbids removal if the suit is brought in a State court.

The language of the New York statute, Laws of 1913, c. 60, amending § 1780 of the Code of Civil Procedure is: "An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only; . . . 4. When a foreign corporation is doing

business within this State". Laws of 1920, c. 916, § 47. The argument for the petitioner is that, construed as it is, it makes a discrimination between citizens of New York and citizens of other States, because it authorizes the Court in its discretion to dismiss an action by a citizen of another State but not an action brought by a citizen of New York, which last it cannot do. *Gregonis* v. *Philadelphia & Reading Coal & Iron Co.*, 235 New York, 152. It is said that a citizen of New York is a resident of New York wherever he may be living in fact, and thus that all citizens of New York can bring these actions, whereas citizens of other States can not unless they are actually living in the State. But however often the word resident may have been used as equivalent to citizen, and for whatever purposes residence may have been assumed to follow citizenship there is nothing to prohibit the legislature from using 'resident' in the strict primary sense of one actually living in the place for the time, irrespective even of domicile. If that word in this statute must be so construed in order to uphold the act or even to avoid serious doubts of its constitutionality we presume that the Courts of New York would construe it in that way; as indeed the Supreme Court has done already in so many words. *Adams* v. *Penn Bank of Pittsburgh*, 35 Hun. 393. *Duquesne Club* v. *Penn Bank of Pittsburgh*, 35 Hun. 390. *Robinson* v. *Oceanic Steam Navigation Co.*, 112 N. Y. 315, 324. *Klotz* v. *Angle*, 220 N. Y. 347, 358. See *Canadian Northern Ry. Co.* v. *Eggen*, 252 U. S. 553, 562, 563. The same meaning seems to be assumed in *Gregonis* v. *Philadelphia & Reading Coal & Iron Co.*, 235 N. Y. 152. We cannot presume, against this evidence and in order to overthrow a statute, that the Courts of New York would adopt a different rule from that which is well settled here. *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390.

Construed as it has been and we believe will be construed the statute applies to citizens of New York as well as to others and puts them on the same footing. There is no discrimination between citizens as such, and none between non-residents with regard to these foreign causes of action. A distinction of privileges according to residence may be based upon rational considerations and has been upheld by this Court, emphasizing the difference between citizenship and residence, in *La Tourette* v. *McMaster*, 248 U. S. 465. Followed in *Maxwell* v. *Bugbee*, 250 U. S. 525, 539. It is true that in *Blake* v. *McClung*, 172 U. S. 239, 247, 'residents' was

taken to mean citizens in a Tennessee statute of a wholly different scope, but whatever else may be said of the argument in that opinion (compare p. 262, *ibid.*) it cannot prevail over the later decision in *La Tourette* v. *McMaster*, and the plain intimations of the New York cases to which we have referred. There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned.

As to the grant of jurisdiction in the Employers Liability Act that statute does not purport to require State Courts to entertain suits arising under it but only to empower them to do so, so far as the authority of the United States is concerned. It may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty. But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse. *Second Employers' Liability Cases*, 223 U. S. 1, 56, 57.

Judgment affirmed.

The CHIEF Justice, Mr. Justice VAN DEVANTER and Mr. Justice BUTLER dissent.

A true copy.

Test:

Clerk, Supreme Court, U. S.